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In the

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

80-27

DAVID DEVOTO and CHARLES F. VOLK,
Petitioners,

vs.

PACIFIC FIDELITY LIFE INSURANCE CO. and
BANKERS MORTGAGE COMPANY OF CALIFORNIA,
Respondents.

Petition For a Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the

Supreme Court of the United States

October Term, 1979

No. .....

David DeVoto and Charles F. Volk,
Petitioners,

vs.

Pacific Fidelity Life Insurance Co. and
Bankers Mortgage Company Of California,
Respondents.

Petition For a Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners, David DeVoto and Charles F. Volk, (hereinafter "Petitioners") pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which reversed the opinion of the District Court granting judgment in favor of petitioners on two claims.

OPINIONS OF THE COURTS BELOW

The opinion of the District Court granting summary judgment of dismissal against Petitioners (Plaintiffs below) is reported at 354 F.Supp. 874 (N.D. Cal., 1973) and is attached as Appendix "A" to the Petition.

The opinion of the Court of Appeals for the Ninth Circuit reversing the District Court's summary judgment of dismissal granted in favor of the defendants-respondents is reported at 516 F.2d 1 (9th Cir., 1975) *cert. denied,* 423 U.S. 894 (1975), and is attached as Appendix "B" to this Petition.

The opinion of the District Court on remand, denying defendants-respondents' Motions for Judgment Notwithstanding the Verdict and/or New Trial is attached as Appendix "C" to this Petition.

The opinion of the Court of Appeals for the Ninth Circuit reversing the District Court's judgment in favor of the petitioners is reported at 1980-1 Trade Cases ¶ 63,280, and is attached as Appendix "D" to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 9, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED FOR REVIEW

Whether a conglomerate's reciprocal business practice of keeping business within its corporate subsidiaries despite the proven existence of financially more advantageous alternatives outside the corporate group should be judged by a *per se* analysis? Whether petitioners were denied their right to trial by jury as guaranteed by the constitution of the United States and the decisions of this Court?

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. § 1) provides, in pertinent part:

> "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or

commerce among the several States, or with nations, is declared to be illegal . . ."

Amendment VII to the Constitution of the United States (U.S. Const. Amend. VII):

"Amendment VII—Civil Trials

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined by any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

A. Nature of the Case

This is a private antitrust suit brought by petitioners pursuant to Section 4 of the Clayton Act (15 U.S.C. § 15) alleging violation by defendants-respondents Bankers Mortgage Company of California and Pacific Fidelity Life Insurance Company of Section 1 of the Sherman Act (15 U.S.C. § 1).

B. Course of the Proceedings Below

The complaint was filed by petitioners on July 15, 1970. Respondents Bankers Mortgage and Pacific Fidelity filed a motion to dismiss the complaint under Rule 12 F.R. Civ. P. on September 1, 1970, alleging that (1) the complaint failed to state a cause of action, and (2) petitioners lacked standing to sue. The District Court denied the motion from the bench on December 4, 1970, and Bankers Mortgage and Pacific Fidelity filed their answers denying the allegations on December 14, 1970.

On April 4, 1972, Bankers Mortgage and Pacific Fidelity, less than one month before trial, filed amended answers

alleging that (1) their acts did not take place in nor did they affect interstate commerce, and (2) their acts were immunized under the McCarran-Ferguson Act. On April 18, 1972, Bankers Mortgage and Pacific Fidelity filed motions under Rule 56 F.R. Civ. P. for summary judgment alleging that: (1) no genuine issue of material fact existed as to whether or not their acts (a) indicated an anticompetitive motive, purpose or effect, or (b) were in or affected interstate commerce; (2) petitioners lacked standing to sue; and (3) the conduct was immunized. On April 27, 1972, petitioners filed their opposition and, in addition, moved under Rule 56 F.R. Civ. P. for a partial summary judgment alleging that no genuine issue of fact existed on the issue of liability.

On January 29, 1973, the District Court granted the motion by Bankers Mortgage and Pacific Fidelity, and denied petitioners' motion for partial summary judgment. Although the District Court found that petitioners had standing to sue and that the acts of respondents were not immunized, the District Court found as a matter of law that there was no triable issue of fact with respect to whether the acts of Bankers Mortgage and Pacific Fidelity: (1) were done with an anticompetitive motive, purpose, intent or had such an effect; and (2) were in or affected interstate commerce. The District Court found that, *as a matter of law,* the acts of Bankers Mortgage and Pacific Fidelity were done "for business reasons" and "for reasons of their own which are not relevant here." Judgment was entered on January 30, 1973, and petitioners filed their notice of appeal on February 14, 1973.

On January 16, 1975, the Court of Appeals for the Ninth Circuit reversed the decision of the District Court and remanded the case to the District Court for further proceedings.

On May 15, 1975, the Court of Appeals issued a revised opinion and concurrently denied respondents' petition for rehearing *en banc*, noting that "The full court has been advised of the suggestion for *en banc* rehearing and no judge of the court has requested a vote on the suggestion for rehearing *en banc*."

On August 13, 1975, the respondents filed a Petition for Writ of Certiorari in this Court alleging that "The great mischief of the Court of Appeals' decision below results from its facile use of quotations from this Court's decisions" and that the result of the decision by the Court of Appeals "is burdensome, irrational, and contrary to established judicial interpretations."

On October 14, 1975, respondents' Petition for a Writ of Certiorari was denied by this Court.

On March 15, 1976, the trial commenced before a jury, the Honorable Spencer Williams, Judge, presiding. On March 30, 1976, the jury returned a verdict in favor of petitioners in the amount of $109,375, the Court stating to the jury that "I certainly cannot disagree one bit with the verdict you brought in" and "according to the results I think you are right on the money." On May 11, 1976, the Court denied the respondents' Motions for Judgment Notwithstanding the Verdict and/or a New Trial, and awarded $85,000 as reasonable attorney's fees pursuant to Section 4 of the Clayton Act (15 U.S.C. § 15).

On May 27, 1976, the respondents filed their Notice of Appeal. On April 9, 1980, the Court of Appeals, after a discussion of certain aspects of petitioners' pendent state claim for tortious interference with prospective business advantage, which was "one of first impression under California law," found no liability on the part of Bankers Mortgage or Pacific Fidelity, and reversed the judgment entered for petitioners.

C. Statement of the Facts

1. THE PARTIES:

Petitioner David DeVoto conducted business under the firm name of Market Placement Agency located in Petaluma, California. Market Placement Agency was at all times relevant herein engaged in the business of providing specialty insurance programs throughout the Western States. Petitioner Charles F. Volk was affiliated with Market Placement Agency as a general agent and representative.

Respondents in this action are Pacific Fidelity Life Insurance Company ("Pacific") and Bankers Mortgage Company of California ("Bankers"), both of which were subsidiaries of the Transamerica Corporation during the relevant time period.

Respondent Bankers during the relevant time period was engaged in the business of making real estate loans. In 1968 Bankers serviced a portfolio in excess of $787 million, representing over 48,000 individual mortgage loans (RT 234; PX 108) and a new loan production of $95 million (PX 108). During the relevant period Bankers was the tenth largest mortgage banker in the United States, the third largest in California, and the largest in Northern California. (RT 166, 234-235).

Respondent Pacific Fidelity sells life, accident, and health insurance throughout the United States. One aspect of Pacific Fidelity's business is the sale of mortgage protection insurance which is insurance sold to a mortgagor to insure the payment of his mortgage in the event he dies or is disabled. Although Bankers does not sell mortgage protection insurance to its customers, it will assist an insurance company by either supplying the insurance company with the names of its customers and/or co-operating with it in a direct mail solicitation of its mortgagors. In exchange for

these services, Bankers receives either commissions on mortgage protection insurance sold to its customers or a flat fee per name supplied.

During the relevant time period, respondents were wholly owned subsidiaries of the Transamerica Corporation. Transamerica's various businesses include, among others, insurance, leisure time service, customer finance, commercial financing, real estate service, business service, mutual funds, educational service, international financing and manufacturing.

2. STATEMENT OF MATERIAL FACTS:

Since 1964 when Bankers became affiliated with Transamerica Company, until 1970 when Pacific Fidelity was sold to a non-Transamerica Company, Bankers has dealt exclusively with Pacific Fidelity with respect to mortgage protection insurance (PX 1).

In the fall of 1967, the Vice-President of Bankers, Harold Granger, was contacted by Charles Volk with a new proposal for the solicitation and sale of mortgage protection insurance. This policy was one written by American Home Assurance Company and involved the selling of accident and health policies to Bankers' mortgage accounts.

The American Home Program was superior to Pacific's Mortgage Protection Insurance Policy in that among other things, it provided a 25-year benefit term for the mortgage customers to Pacific's 3-year benefit term (RT 134). Granger stated that Pacific had "nothing comparable to that" (RT 114). The American Home proposal also provided a unique financial benefit to Bankers in that American Home offered to pay Bankers $1.25 for each customer of Bankers who was available for solicitation by American Home, thereby guaranteeing cash income to Bankers which had not been guar-

anteed under Pacific's programs (RT 86-87, 90, 840-841). The American Home proposal was a unique and promising business opportunity for Bankers because it offered a product financially more attractive than any proposal previously submitted at any time by Pacific Fidelity (RT 66, 134).

This was the first time since Bankers became a Transamerica subsidary that Bankers had considered a mortgage protection insurance program from some one other than Pacific (RT 86).

Pursuant to the agency agreement between the petitioners and American Home, petitioners were to receive for their services of bringing the two companies together a specified percentage of the revenues received by American Home.

On December 5, 1967, American Home sent the agreement to Bankers Mortgage for their inspection (PX 5). As early as December 5, Bankers was advised by Pacific that Pacific was displeased with the fact of negotiations between Bankers and American Home (RT 95).

On December 6, Granger of Bankers attached the American Home agreement to a memorandum sent to Bankers' officers. The memorandum reflects Granger's concern, based on his conversations with Pacific's representatives, that the agreement with American Home may "result in some conflict with our present associates." The "associates" were identified as the defendant, Pacific Fidelity (RT 98).

Six days later, on December 12, 1967, Mr. Granger of Bankers at the request of Kent Colwell, the president of Bankers, sent the policies and advertising material to both Occidental Life Insurance Company ("Occidental"), another Transamerica subsidiary (RT 99-100; PX 10 and 12), and Pacific (RT 107). This material was sent to Occidental because Colwell, in order to keep the business in the Transamerica family, wanted to ascertain if either of the Transamerica subsidiaries, Occidental or Pacific, could "match or better" the American Home proposal (RT 1007-8).

On December 27, 1967, Occidental replied:

> "Occidental cannot match Am. Home offer, especially in view of second solicitation, Bill Dandy cannot see Am. Home penetration sufficient to match." (PX 10; RT 100-101).

At or about the same time, Robert Coan, Vice President of Pacific Fidelity, informed Colwell, the President of Bankers, that American Home's proposal "appeared to be a favorable policy for Bankers Mortgage Company, but one which Pacific Fidelity was not prepared to offer." (RT 672-673, 1079-1080). Accordingly, Pacific did not initially attempt to revise their program to counter or meet American Home's unique program (RT 293, 672, 934, 1082). In fact Colwell testified that the clear superiority of the American Home package was akin to "comparing apples and oranges between American Home and Pacific Fidelity" (RT 1085) and "at the time we entered in the American Home agreement, we [Bankers] did not have a real choice here." (RT 1083, 1086).

On January 19, 1968, an interoffice memorandum of Pacific admits that its program for Bankers had not changed since 1964 when Bankers became a Transamerica subsidiary and that:

> "We feel the time has come for a 'fresh look' for this material. Even though it has 'pulled' fairly well with new accounts, it could undoubtedly be improved. And to use the same material on the old accounts—now for the fourth or fifth time on some of them—is, probably, starting to get somewhat 'tired' and passe to a lot of them." (PX 86).

On March 27, 1968, Harold Granger on behalf of Bankers executed American Home's Mortgage Agency agreement (PX 21).

Colwell, President of Bankers, testified that when Bankers signed this contract with American Home it was based upon the "competitive merits" and American Home's proposal "was better than any other offer that [Bankers] had received up to that time." (RT 1090-1091).

Notwithstanding the fact that Bankers had signed a binding contract with American Home, Pacific undertook to prepare several studies designed first, to induce and then to coerce Bankers into breaching its contract with American Home. Such a course of conduct was pursued by Pacific even though Pacific was repeatedly advised by Bankers that Bankers had already entered into a contract with American Home. (RT 140, 147). Pacific felt that the loss of Bankers, an "important account" to an "outside" company, would put Pacific at a competitive disadvantage with prospective customers. (RT 265).

One such study prepared by Pacific entitled "Yield Comparison—Pacific Fidelity Life—American Home" listed various considerations which were designed to favorably influence Bankers into remaining with Pacific. (PX 23).

The first of these considerations states:

> "1. All profits for both PFLI. and BMC., coming out of our combined effort, stay within the Transamerica family."

The first consideration is in furtherance of the reciprocal dealing principle of the Transamerica family that subsidiaries should keep business within the Transamerica Corporation. (RT 166, 700, 1087, 1113).

With respect to this first consideration, Laity testified at trial as follows:

> "Q. There would be no way then American Home could compete against consideration number one, could there?

"A. No.

"Q. Because they're not a member of the Transamerica family, right?

"A. That's correct.

"Q. So that this was a factor which you knew, that American or anybody else who was not a family of Transamerica, that this was factor you could use and nobody else could, right?

"A. Yes." (RT 303). (See also, RT 142-143).

The second consideration was:

"2. PFLI has more than a pure business interest in Bankers Mortgage Company."

Laity of Pacific testified that this additional consideration was the result of the affiliate relationship between Bankers and Pacific and that "but for" the corporate affiliation between Bankers and Pacific, the second consideration "would not have come into the picture whatsoever." (RT 305).

The third consideration states:

"3. A strong possibility of cancellation exists with an outside company, if, two or three years ahead, an unfavorable loss ratio should develop."

This consideration had no support in fact as attested to by the trial testimony of the defendants' representatives. (RT 143-144).

The Pacific Fidelity "Yield Comparison" (PX 23) was subsequently approved by Boddiger, the President of Pacific and was then shown to Bankers in a meeting which took place in April of 1968. (RT 862). Although Bankers had entered into a contractual arrangement just three weeks prior to this meeting, Granger attended the meeting because "Laity was a very persevering salesman and he was constantly talking to me about the program" (RT 140) and

"Mr. Laity was pressuring me." (RT 203). When pressed at trial as to whether he sought to pressure Mr. Granger, Mr. Laity was forced to admit that he did. (RT 342).

At the meeting held in April of 1968 between representatives of Pacific and Bankers, Granger was not at that time persuaded by Pacific's entreaties and studies, and stated that Bankers intended to honor the existing contract between Bankers and American Home. (RT 336, 862).

On May 21, 1968, in light of Pacific's persistent entreaties, Granger wrote to Pacific and responded to each of Pacific's arguments which recommended that Bankers abrogate their agreement with American Home. Mr. Granger testified that the purpose of his letter was as follows:

> "A. Well, the whole purpose of this letter was point by point to answer all of Mr. Laity's arguments to me about not continuing with American Home.
>
> "He was very persistent. I said I thought this would collectively answer everything he could present to me and, in essence stop pestering me on the subject." (RT 182).

The important reasons for staying with American's competitive program were the approximately $50,000 commission advance under the American Home program, and Pacific Fidelity's poor penetration which the letter states is only 4.26% and "not impressive" as compared with approximate 20% sale of other mortgage banking company insurance programs. Indeed, Bankers notes that if American can "produce the results they anticipate, it could serve to sharpen our [Bankers] own competitive edge." This was so in spite of the fact that preferential and discriminatory treatment is given to Transamerica or family members:

> "While it is our goal, insofar as possible, to keep business within the Transamerica family; there may,

nevertheless, be situations in which introducing an outside factor can be beneficial."

Therefore as of May 21, 1968, Bankers was of the view, based upon its own competitive interest, that the existing contract with American should be honored. (RT 162-163).

Pacific continued to pressure Bankers to yield to the inherent coercion of "family connections" to exclude outside non-affiliated companies. On May 24, 1968, just three days after Bankers' detailed "explanation" to Pacific why American's program was so superior and why Bankers "should not attempt to abrogate" the American contract, Pacific persuaded Bankers "in accordance with our telephone conversation" to send copies of all of the solicitation material supplied by American to Pacific Fidelity (PX 29). The only reason proffered at trial by Mr. Laity for this request was to continue to try "to get Bankers' business." (RT 322).

Pacific finally confronted the realization that their pressure tactics up to this point had not been effective "and that something else had to be done." (RT 864). Laity sought and received permission from Boddiger, the President of Pacific "to go ahead and match the offer that American Home had made to Bankers Mortgage Company." (RT 339, 864).

Although Bankers initially refused to abrogate the contract in spite of the expressed policy of keeping business within the Transamerica family wherever possible, sometime "in June of 1968" (RT 352, 944), representatives of Bankers and Pacific met in Bankers' office and orally agreed to accept Pacific's alleged duplicative proposal. (RT 353, 847). This agreement was orally accepted in June of 1968, but was not reduced to writing until September of 1968. (PX 1; RT 848).

On July 18, Bankers memorialized the understanding between itself and Pacific Fidelity "based upon your matching the agreement we have with the American Home Group," and the execution by Pacific of a Hold Harmless Agreement in favor of Bankers.

Bankers Mortgage Company's insistence that Pacific Fidelity execute the Hold Harmless Agreement is of great significance and definitively indicates that Bankers knew that they were impairing the legal rights of both American Home and Market Placement Agency when they conspired to break their contract with American Home.

In obtaining the Hold Harmless Agreement, Pacific's Laity wrote Pacific's chief executive officer George Boddiger, in an interoffice memorandum and cavalierly advised that although it was clear the contract was abrogated and suit could be brought:

> "The maximum award they could get would be the anticipated 2 year profits they expected." (PX 67).

In the same memo, Laity writes to his superior that it was Granger's opinion that American, although upset,

> "understood the situation, particularly since Pacific Fidelity Life was a Company affiliated with Bankers Mortgage and the Transamerica Corporation."

Although the evidence conclusively shows that the defendants unsuccessfully attempted to match American's program, the mere fact of "matching" a competing program does not legitimatize illegal reciprocal dealings. The Supreme Court has held and the jury below was so instructed that defendants' anti-competitive practice of reciprocity based on common ownership introduces an "irrelevant and alien factor" which gave Pacific a priority on business at equal prices. *International Salt Co. v. United*

States, 332 U.S. 392, 396-97 (1947), *Northern Pacific Ry Co. v. United States,* 356 U.S. 1, 3, 6, 12 (1958).

Witnesses for the respondents attempted to prove during trial that the insurance program ultimately offered by Pacific was superior and not simply identical to American's proposal and that competitive merits and not corporate affiliation were the basis of Bankers' decision to utilize Pacific's program. However, the testimony of respondents' witnesses on the issue of whether the program offered by Pacific was equal to or superior to American Home's proposal is typified by the testimony of Harold Granger as to whom the trial Court made the following observation (outside of the jury's presence):

> "Seeing Mr. Granger on the stand, I wonder if he would ever be final and firm on anything he ever did. He seemed to equivocate, change his position, change his mind, reconsider, sweat over things, agonize." (RT 1171).

An exhibit introduced at trial bearing notations of Granger's telephone conversations states:

> "8/12/68. Don Laity - Volk & DeVoto sending contract per Don - will match American Home deal - subject to renegotiate deal." (PX 26).

Exhibit 61 is an interoffice memorandum from Laity to Boddiger, President of Pacific, by which Laity seeks permission to "match" American's program.

The testimony of Granger and Laity established that the program offered by Pacific at the time of the breach was not "better" than American's proposal.

Mr. Granger attested to this fact:

> "Q. Can you think of any aspects of the agreement with Pacific Fidelity which differed from the American Home agreement?

"A. No, I can't think of any.

"Q. It is your recollection then it was identical?

"A. To my recollection, yes." (RT 201).

When confronted with his deposition testimony at trial, Mr. Granger flatly stated: "My answer was incorrect on the deposition." (RT 201).

Similarly, Laity testified:

"Q. Was there any other respect that you recall that your proposal differed from American Home?

"A. Not that I can recall at this moment." (RT 866).

And Kent Colwell, the President of Bankers, testified:

"Q. Do you know if their package was modeled after the American Home proposal?

"A. It would be difficult to say it was not modeled after it, since it had most of the same provisions." (RT 702).

Notwithstanding the prior testimony and documentary evidence which unequivocally and in plain and direct language states that Pacific need only match American's offer and execute a Hold Harmless Agreement on behalf of Bankers as conditions precedent to the breach of American's contract, the defendants' witnesses disregarded their sworn testimony and the documentary evidence and simply reconstructed their testimony.

Contrary to his earlier testimony, Granger, during trial and for the first time, stated that an additional condition imposed upon Pacific as a prerequisite to the breach "other than simply matching American Home's offer" was that Bankers be allowed to participate "in the profits of the program." (RT 192). This profit sharing program was referred to as "Retro." (RT 192). However, testimony and documents introduced at trial exposed this self-serving contrivance.

Plaintiffs' Exhibit 40, which is a letter dated August 21, 1968, from Mr. Laity to Granger, states:

> "I (Mr. Laity) am very sorry if I have been the cause of any misunderstanding regarding the Retro. If you recall, agreement had been reached to use Pacific Fidelity Life instead of American Home *before* the Retro was a subject of discussion." (PX 40).

and

> "When John Mutschler and I visited with you, it was after the change was agreed upon that I volunteered to arrange some kind of profit sharing for Bankers Mortgage." (*Ibid.*)

Mr. Granger was directly impeached on this subject by his own prior testimony:

> "Q. Were you relying on this profit sharing, Mr. Granger, or this Retro when you cancelled American Home's contract?
>
> "A. I was relying upon it, yes.
>
> "Q. I direct your attention to page 86 of your deposition beginning line 6.
>
> "I ask you if you gave this answer to this question:
>
> 'Q. Were you relying on the facts that there would be a profit sharing when you cancelled the agreement?
>
> 'A. I can't say to what degree it had any bearing on the decision.'
>
> "A. Which line number is that, Mr. Alioto?
>
> "Q. I'm sorry, beginning line 7, page 86.
>
> 'Q. Were you relying on the fact that there would be profit sharing when you cancelled the agreement?
>
> 'A. I can't say to what degree it had any bearing on the decision.'
>
> "A. That is an incorrect answer in my deposition." (RT 210).

Laity of Pacific confirmed at trial that the Retro arrangement was not a condition precedent to the breach of the American Home contract:

> "Q. So that this profit sharing wasn't even talked about until after Mr. Granger had already agreed that he was going to break the contract with American?
>
> "A. It appears that way. However, after — could have been immediately after that Bankers Mortgage had agreed to continue with Pacific Fidelity, possibly the very same day, but as an afterthought.
>
> "Q. In other words, it was not part of your offer to Bankers to go with you?
>
> "A. Well, I can't answer that accurately.
>
> "Q. Well, taking a look at what you wrote on August 21, 1968, you said that it wasn't even discussed until after the agreement was reached, correct?
>
> "A. That was the way that I recall it.
>
> "Q. On August 21, 1968, correct?
>
> "A. That's correct." (RT 359).

Mr. Mutschler of Pacific confirmed that Retro was an afterthought:

> "Q. So we get the facts straight, he (i.e., Granger) had expressed his intention before this profit sharing was even mentioned?
>
> "A. That's right." (RT 1013).

The trial record is replete with evidence upon which the jury could and did draw the justifiable inference that the defendant Bankers breached the contract with American based solely upon the "alien and irrelevant fact" of their corporate relationship with Pacific and not upon a competitive basis.

Kent Colwell stated that one of the duties and responsibilities attendant to his position as President of Bankers

was to "help set policy . . . ." (RT 1071). In light of his responsibility to formulate company policy, Colwell stated at trial:

> "Q. From time to time, have you ever counseled anyone in trying to keep the various businesses of the different subsidiaries of Transamerica in the Transamerica family?
>
> "A. I believe I was asked a similar question in this deposition in 1971. I answered yes. I couldn't recall exactly what circumstances.
>
> "The only circumstance I can recall is in suggesting to some of the people that work for me that when they're renting a car that they rent a Budget car rather than Hertz or Avis. That is because it costs less money for the company."

However, further evidence adduced at trial demonstrates other instances in which Colwell, the president and policy maker of Bankers, admonished employees to utilize Transamerica subsidiaries. George E. Mitchell, a former vice president in charge of the Project Mortgage Department for Bankers testified at trial:

> "Q. In 1968 or 1969 when you did use this Transamerica Title Insurance Company for your business at Bankers Mortgage, were you advised to use it by anyone at Bankers Mortgage?
>
> "A. I was asked to attempt to utilize the services of sister companies if possible, all things being equal.
>
> "Q. And who so advised you?
>
> "A. The president of the company, Mr. Kent Colwell." (RT 1161).

As to the competency of Transamerica Title Insurance Company, Mr. Mitchell stated:

> "Q. After you in fact used the Transamerica Company, Transamerica Title Company, did you stop using them?

"A. Yes.
"Q. Why?
"A. They weren't sufficiently competent."
(RT 1167).

* * * *

"Q. In the absence of his [Colwell's] suggestion, would you have used Transamerica in that situation?
"A. No.
"Q. Pardon me?
"A. I would not, no." (RT 1168).

With respect to this policy of keeping business within the Transamerica family, Granger responded that "this was frequently brought up by several of our directors" (RT 700) and that he "shared it to some degree." (RT 701).

George C. Boddiger, the President of Pacific Fidelity, testified:

"Q. Have you ever verbally expressed the idea that Transamerica subsidiaries should do business within the Transamerica family whenever possible?
"A. I don't recall that I have.
"Q. Have you heard others express this idea?
"A. Yes, I think so." (RT 1113).

The pervasiveness of the sentiment that business should be kept within the Transamerica family was prophetically conveyed to one of the plaintiffs by Richard Freeman, a representative of the Transamerica subsidiary. Plaintiff Volk had the following discussion with Mr. Freeman:

"Q. And did you at any time have any discussions with Mr. Freeman about your attempts to get American Home and Bankers Mortgage together?
"A. Yes. The time period would be somewhere between September and October or November of 1967. Mr. Freeman came into my office on a routine matter which I couldn't tell you what it was; but, he came to Petaluma to my office and he said, I understand you're

trying to take the business away from or get Bankers Mortgage's business.

"And I said, yes, we have been making several proposals to them. And, he laughed and said, you know, you can't do that. And I said, why not.

"He said well, because we own them. And I said what do you mean you own them. He said well, they're part of the Transamerica Company.

"And I said well, indication so far has been good and I think we have a good chance.

"And he laughed and he said it just can't be done." (RT 457-458).

In a study prepared by Pacific to induce Bankers to breach their contract with American, Pacific lists as "considerations":

1. *All profits for both PFLI and BMC, coming out of our combined effort, stay within the Transamerica family.*
2. *PFLI has more than a pure business interest in Bankers Mortgage Company.* (PX 24).

In the May 21st correspondence from Granger to Laity setting forth Bankers' reasons for honoring (at that time) the contract with American Home, Granger states:

> *Because of our family connection, we have endeavored to review this as fairly as possible, exploring all of the pros and cons, both within our own management and with our Board of Directors.* (PX 28).

When questioned during trial why he (George) felt constrained to include this reference to "our family connection", Granger replied:

> "Q. Now, why did you put that in there, 'because of our family connection'?"
>
> "A. Well, we had a close relationship. It's natural, I believe, to refer to all the members of an ownership corporation as part of the family.

"Q. Yes; and, that's what Mr. Laity was attempting to use on you, is that not correct, in an attempt to get you to break the contract with American?

"A. Yes." (RT 153); and

"Q. Can you answer whether or not the reason that you put it in there was to show Mr. Laity that you agreed in principle with what he was saying about keeping business in the Transamerica family.

"A. Yes." (RT 168).

The evidence outlined above and as interpreted by the jury clearly demonstrates that but for the corporate affiliation and the pressure exerted based upon this affiliation, the original agreement would have been performed to the benefit of Bankers, American Home, and plaintiffs. However, by virture of the affiliation, a substantial market was foreclosed and Pacific maintained its exclusive status.

REASONS FOR GRANTING THE WRIT

A. Conflicts With the Decisions of This Court.

1. RECIPROCAL ARRANGEMENTS ARE ANALOGOUS TO TYING AGREEMENTS AND SHOULD BE JUDGED BY A PER SE STANDARD.

The undisputed evidence shows that the sole purpose, motive and effect of the combination between Bankers and Pacific was to keep the business in the Transamerica "family" and to fence out and foreclose outside, non-affiliated competitors. As a matter of law, "reciprocity" is an anticompetitive practice and closely akin to the *per se* offenses of tying arrangements. The Supreme Court has repeatedly held that tying arrangements are *per se* unlawful. *International Salt Co. v. United States,* 332 U.S. 392 (1947); *Northern Pac. R.R. v. United States,* 356 U.S. 1 (1958); *United States v. Loew's Inc.,* 371 U.S. 38 (1962).

In *F.T.C. v. Consolidated Foods Corporation,* 380 U.S. 592, 594 (1965) the Supreme Court recognized the economic evils of reciprocal dealings:

> "We hold at the outset that the 'reciprocity' made possible by such an acquisition is one of the congeries of anticompetitive practices at which the antitrust laws are aimed. The practice results in 'an irrelevant and alien factor' intruding into the choice among competing products, creating at the least 'a priority on the business at equal prices.' *International Salt Co. v. United States,* 332 U.S. 392, 396-397; *Northern Pacific Ry. Co. v. United States,* 356, U.S. 1, 3, 6, 12."

The facts show (1) that Pacific Fidelity had an exclusive with Bankers; (2) that Bankers acting out of its own self interest entered into a minimum 2 year contract with American Home; (3) that Bankers was initially able to ward off Pacific Fidelity's attempt to keep its exclusive with Bankers; (4) that by reason of "pressure from above" and "pressure from PF" to keep the business in the Transamerica "family" Bankers abrogated the contract with American Home; (5) that all Pacific Fidelity was required to do in the face of the 2 year minimum contract between Bankers and American Home was to "match" American Home's contract and hold Bankers harmless against the anticipated litigation by American Home and the petitioners; and (6) that Pacific Fidelity had successfully maintained its exclusive with Bankers solely because of its corporate relationship with Bankers.

The Supreme Court has drawn an analogy between reciprocity cases and tying cases. *FTC v. Consolidated Foods, supra.* Both situations introduce a foreign factor between otherwise free competition with the effect of foreclosing a market.

The facts in this case are strikingly similar to the "preferential clauses" in *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1 (1958), in which the Supreme Court affirmed a summary judgment in favor of an antitrust plaintiff. In

Northern Pac. Ry. Co., the defendant had "preferential routing clauses" which compelled the lessees of bordering land owned by the defendant to use only the defendant's railroad "provided that its rates (and in some instances its service) were equal to those of competing carriers." 356 U.S. at 3. The defendant contended that its preferential clauses had not been enforced, or at least, on the few occasions in which they might have been, they did not significantly restrain competition. The defendant pointed out that the clauses permitted the lessees to ship by competing carrier if its rates were lower or its service better than the defendant's. The Supreme Court found the preferential clauses to be *per se* unlawful. The Court noted that the preferential clauses conferred no benefit on the lessees, and that the defendant's "purpose obviously was to fence out competitors, to stifle competition." 356 U.S. at 8. In concluding, the Court said:

> "In *International Salt* the defendants similarly argued that their tying arrangements were inoffensive restraints because they allowed lessees to buy salt from other suppliers when they offered a lower price than International. The Court's answer there is equally apt here.
>
> " '[This exception] does, of course, afford a measure of protection to the lessee, but it does not avoid the stifling effect of the agreement on competition. The appellant had at all times a priority on the business at equal prices. A competitor would have to undercut appellant's price to have any hope of capturing the market, while appellant could hold that market by merely meeting competition. We do not think this concession relieves the contract of being a restraint of trade, albeit a less harsh one than would result in the absence of such a provision.' 332 U.S. at page 397, 68 S.Ct. at page 15.

> "All of this is only aggravated, of course, here in the regulated transportation industry where there is frequently no real rate competition at all and such effective competition as actually thrives takes other forms."
>
> "Affirmed." 356 U.S. at 12.

In this case, Pacific Fidelity was given a preference over American Home solely because Pacific and Bankers were both subsidiaries and part of the Transamerica "family." Like *Northern*, no benefit was conferred on Bankers for being forced to abrogate the contract with American Home, simply because Pacific was a "family" member and "entitled" to maintain its exclusivity by being able to "hold that market by merely meeting competition." Like *Northern*, the obvious purpose of the combination "was to fence out competitors, to stifle competition."

In *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966), the Court said:

> "This court finds that reciprocity, whether coercive in nature or based on mutual patronage, is an anti-competitive practice.
>
> * * *
>
> "[Reciprocity] distorts the focus of the trader by interposing between him and the traditional competitive factors of price, quality, and service an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit. The efficient producer may thereby suffer loss because of circumstances extrinsic to the worth of his products [or services]."

From the undisputed facts, it is patently clear that the only and sole reason why Bankers did not proceed under the contract with American Home was because American Home was not a "family" member. This was, of course, beyond American's power to rectify.

It should also be noted that the Court in *General Dynamics,* like the Supreme Court, equated reciprocity to tying-in cases:

> "Those who have had occasion to consider the use of reciprocity as an anticompetitive practice have invariably analogized it to 'tying-in' agreements. (Cites omitted.) The Court finds, for reasons to be discussed shortly, that the analogy is sound."

Accord, Columbia Nitrogen Corporation v. Royster Company, 451 F.2d 3, 13 (4th Cir. 1971).

In *United States v. Empire Gas Corporation,* 393 F.Supp. 903 (W.D. Mo. 1975), the Court sets forth the requisite elements of a reciprocity agreement in violation of the Sherman Act:

> "(1) that a *quid pro quo* was demanded or understood to be an integral part of the reciprocal purchases (citation omitted); and (2) that a "not insubstantial" amount of trade in a use of commerce was restrained. *See* e.g., *International Salt Co. v. United States,* 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); *United States v. General Dynamics Corporation,* 258 F.Supp. 16 (S.D.N.Y. 1966)."

In the instant case the parties stipulated that the relevant market for purposes of this case is the market for the sale of mortgage protection insurance in California, which consists of all residential mortgagors in the State of California whose loans are serviced by mortgage bankers, savings and loan associations or commercial banks; and that Bankers' share of this market for this period averaged about 32,000 mortgagors with a remaining principal balance of slightly in excess of $500 million (RT 1320-21).

This figure of $500 million is one hundred times larger than the $500,000 figure initially designated by the Supreme Court in *International Salt Co. v. United States,* 332 U.S.

392 (1947), as constituting a "not insubstantial amount" of commerce. *Supra* at 396.

B. The Decision Below Is Contrary to the Letter and Spirit of the Seventh Amendment to the Constitution.

C. The Decision Below Is Contrary to the Letter and Spirit of This Court's Decisions in Beacon Theatres v. Westover, 359 U.S. 500 (1959) and Tennant v. Peoria & P.U. Ry., 321 U.S. 29 (1944).

In *Beacon Theatres, supra,* this Court explicitly stated that the jury in antitrust cases was "an *essential* part of the congressional plan for making competition rather than monopoly the rule of trade." Yet, over the past decade, so many cases have vacated jury verdicts and either granted judgment n.o.v. or new trials that no putative antitrust violator could possibly believe that it would or could ever be held accountable.

In *Wen Mar Enterprises, Inc. v. Alexander Motor Co., et al.,* (9th Cir. 1969) 416 F.2d 15, the jury found in favor of plaintiff. The District Court granted judgment n.o.v. for defendant. The Court of Appeals affirmed. In *Hawaiian Oke v. Seagram,* (9th Cir. 1969) 416 F.2d 71, *cert. denied* 396 U.S. 1062 (1970), the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed the lower court and dismissed the suit. In *Household Goods Carriers' Bureau v. John Terrell, et al.,* (5th Cir. 1969) 417 F.2d 47, the jury found in favor of plaintiff. The District Court granted judgment n.o.v. in favor of defendant. The Court of Appeals affirmed. In *Harrison v. Prather,* (5th Cir. 1970) 435 F.2d 1168, the jury found for plaintiff. The District Court affirmed. The Court of Appeals affirmed the verdict for plaintiff, but remanded on the issue of damages. In *Belliston v. Texaco,* (10th Cir. 1972) 455 F.2d 175,

cert. denied, 408 U.S. 928 (1972), the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed. In *Siegel v. Chicken Delight, Inc.,* (9th Cir. 1971) 488 F.2d 43, *cert. denied,* 405 U.S. 955 (1972), the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals remanded on the issue of damages. In *Herald Co. v. Albrecht,* (8th Cir. 1971) 452 F.2d 124, the jury found in favor of plaintiff. The District Court reduced the amount of damages awarded by a substantial amount. The Court of Appeals affirmed that reduction. In *Elder-Beerman Stores Corp. v. Federated Dept. Stores,* (6th Cir. 1972) 459 F.2d 138, the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed and remanded for further proceedings. In *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee,* (5th Cir. 1972) 467 F.2d 178, *cert. denied,* 409 U.S. 1109 (1973), the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed and directed dismissal of the complaint. In *Weather Wise Company v. Aeroquip,* (5th Cir. 1972) 468 F.2d 716, the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed and found in favor of defendant. In *Ag-Chem Equipment Co., Inc. v. Hahn, Inc.,* (8th Cir. 1973) 480 F.2d 482, the jury found in favor of plaintiff. The District Court granted partial judgment n.o.v., awarding some damages to plaintiff. The Court of Appeals affirmed the n.o.v. judgment and vacated the remaining judgment for plaintiff. In *Audrey D. Hanson d/b/a Hanson Paint & Glass v. Pittsburg Plate Glass Industries, Inc.,* (5th Cir. 1973) 482 F.2d 220, the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed and found for defendant. In *Hallmark*

Industry v. Reynolds Metal Co., (9th Cir. 1973) 489 F.2d 8, *cert. denied*, 417 U.S. 932 (1974), the jury found in favor of plaintiff. The District Court granted judgment n.o.v. for defendant. The Court of Appeals affirmed. In *Scott Medical Supply Co. v. Bedsole Surgical Supplies, Inc.*, (5th Cir. 1974) 488 F.2d 934, the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed and remanded. In *John M. England v. Chrysler Corp.*, (9th Cir. 1974) 493 F.2d 269, *cert. denied* 419 U.S. 869 (1974), the jury found in favor of plaintiff. The District Court granted judgment n.o.v. in favor of defendant. The Court of Appeals affirmed. In *Ford Wholesale Co., Inc., v. Fibreboard Paper Products Corp.*, (9th Cir. 1974) 493 F.2d 1204, *cert. denied*, 419 U.S. 876 (1974), the jury found in favor of plaintiff. The District Court granted judgment n.o.v. in favor of defendant. The Court of Appeals affirmed. In *REA v. Ford Motor Co.*, (3rd Cir. 1974) 497 F.2d 577, the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals remanded for a new trial. In *Champion Oil Service Co. v. Sinclair Refining Co.*, (6th Cir. 1974) 502 F.2d 709, *cert. denied*, 420 U.S. 930 (1974), the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed and directed the District Court to enter judgment n.o.v. for defendant. In *Venzie Corp. v. U.S. Mineral Product Co.*, (3rd Cir. 1975) 521 F.2d 1309, the jury found in favor of plaintiff. The District Court granted judgment n.o.v. in favor of defendant. The Court of Appeals affirmed. In *Kestenbaum v. Falstaff*, (5th Cir. 1975) 514 F.2d 690, *cert. denied*, 424 U.S. 943 (1976), the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed and remanded for a new trial. In *Defilippo v. Ford Motor Co.*, (3rd Cir. 1975) 516 F.2d 1313, *cert. denied*, 423 U.S. 912

(1975), the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed and found in favor of defendant. In *Davis v. Marathon Oil Co.*, (6th Cir. 1975) 528 F.2d 395, the jury found in favor of plaintiff. The District Court granted judgment n.o.v. for defendant. The Court of Appeals affirmed. In *Carlyle Michelman v. Clark Schwebel Fiber Glass Corp.*, (2nd Cir. 1976) 534 F.2d 1036, *cert. denied*, 429 U.S. 885 (1976), the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed, entering judgment for defendant. In *Pitchford v. Pepi, Inc.*, (3rd Cir. 1976) 531 F.2d 92, the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed or vacated all but one of the seven-part verdict. In *Spectrofuge Corp. v. Beckman Instruments, Inc.*, (5th Cir. 1978) 575 F.2d 256, *cert. denied*, 440 U.S. 939 (1978), the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed and remanded. In *Sitkin Smelting & Refining Co., Inc., v. FMC Corp.*, (3rd Cir. 1977) 575 F.2d 440, *cert. denied*, 439 U.S. 866 (1978), the jury found in favor of plaintiff. The District Court granted judgment n.o.v. for defendant. The Court of Appeals affirmed. In *GTE Sylvania, Inc. v. Continental*, (9th Cir. 1976) 537 F.2d 980, *Aff.* 433 U.S. 36 (1977), the jury found for plaintiff. The District Court affirmed. The Court of Appeals reversed and remanded for further proceedings. In *Oreck v. Whirlpool Corp.*, (2nd Cir. 1977) 563 F.2d 54, *cert. denied*, 439 U.S. 946 (1978), the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed and granted judgment n.o.v. for defendant. In *Dougherty v. Continental Oil Co.*, (5th Cir. 1978) 579 F.2d 954, the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed and remanded. In *Gough v. Rossmoor Corp.*, (9th Cir. 1978)

585 F.2d 381, *cert. denied,* 440 U.S. 936 (1979), the jury found in favor of plaintiff. The District Court affirmed, denying a judgment n.o.v. for defendant. The Court of Appeals reversed, granting the judgment n.o.v. In *Hayes v. Solomon,* 5th Cir. 1979) 597 F.2d 958, the jury found in favor of all three plaintiffs. The District Court affirmed. The Court of Appeals reversed, dismissing two complaints and remanding the third for further proceedings. In *Stuart M. Kaplan v. Burroughs Corp.,* (9th Cir. 1979) 611 F.2d 286, the jury found in favor of plaintiff. The District Court granted judgment n.o.v. for defendant. The Court of Appeals affirmed. In *Engine Specialties v. Bombardier Limited,* (1st Cir. 1979) 605 F.2d 1, the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals granted judgment n.o.v. against two plaintiffs. In *Refrigerated Food Line, Inc. v. Republic Industries, Inc.,* (8th Cir. 1979) 605 F.2d 412, the jury found in favor of plaintiff. The District Court granted judgment n.o.v. in favor of defendant. The Court of Appeals affirmed. In *Berkey Photo, Inc. v. Eastman Kodak,* (2nd Cir. 1979) 603 F.2d 263, the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed and remanded for a new trial. In *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.,* (2nd Cir. 1979) 602 F.2d 1025, the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed and dismissed the action. In *Magnus Petroleum Co., Inc. v. Shelly Oil Co.,* (7th Cir. 1979) 599 F.2d 196, the jury found in favor of plaintiff. The District Court affirmed. The Court of Appeals reversed, directing a judgment n.o.v. for defendant.

CONCLUSION

For the reasons stated, this writ should be granted and

the judgment of the Court of Appeals for the Ninth Circuit reversed.

DATED: July 2, 1980

Respectfully submitted,

ALIOTO & ALIOTO
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Attorneys for Petitioners

[Appendices Follow]

Appendix A

ORIGINAL
FILED
JAN 29 1973

CLERK, U. S. DIST. COURT
SAN FRANCISCO

In the United States District Court
For the Northern District of California

DAVID DEVOTO and CHARLES S. VOLK, *Plaintiffs,* vs. PACIFIC FIDELITY LIFE INSURANCE COMPANY and BANKERS MORTGAGE COMPANY OF CALIFORNIA, *Defendants.*	No. C-70-1509 SW

MEMORANDUM AND JUDGMENT

Plaintiffs brought this private civil action under Section 4 of the Clayton Act (15 U.S.C. 15) alleging injury through violations of Section 1 of the Sherman Act (15 U.S.C. 1). The two defendants (Pacific Fidelity Life Insurance Company and Bankers Mortgage Company of California) have moved for summary judgment on four separate grounds pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiffs have moved for summary judgment on the issue of liability.

Defendant Bankers Mortgage [Bankers] is in the business of making real estate loans secured by mortgages. Defendant Pacific Fidelity Life Insurance Company [Pacific Fidelity] sells life, accident, and health insurance

throughout the United States. Both defendants were subsidiaries of Transamerica Corporation at all times relevant to this action

One aspect of Pacific Fidelity's business is the sale of mortgage protection insurance. Basically, this is insurance sold to a mortgagor to insure the payment of his mortgage in the event he dies or is disabled. Bankers does not itself sell mortgage protection insurance to its customers but will assist an insurance company in either of two ways. It will supply the insurance company with the names of its customers and/or will cooperate with it in a direct mail solicitation of its mortgagors. In exchange for these services, Bankers receives either commissions on mortgage protection insurance sold to its customers or a flat fee per name supplied.

In 1967 and 1968, Defendant Pacific Fidelity had an exclusive agreement with Defendant Bankers relative to the above described services. At this same time Plaintiff Devoto was conducting business under the name of Market Placement Agency. Market Placement was engaged in the business of providing special insurance programs to businesses throughout the western United States and Plaintiff Charles Volk was employed by it as a general agent. Late in 1967, Volk contacted Bankers and offered a new mortgage protection insurance solicitation plan on behalf of American Home Assurance Company which, among other things, provided for the payment of one dollar and twenty-five cents ($1.25) for each customers' name supplied by Bankers. Bankers was impressed with the plan and elected to enter into a contract with American Home and to cease dealing exclusively with Pacific Fidelity. Bankers also agreed to cooperate with American Home in a direct mail solicitation of its mortgagors. The contract between Bankers and American Home was signed in January 1968.

Undaunted by this turn of events Pacific Fidelity made Bankers a new offer in April 1968 closely resembling the American Home plan, in which they sought to replace American Home and make the mass mail solicitation that American Home had planned with Bankers' cooperation for the fall of 1968.

In June 1968, Bankers informed American Home that they had decided to accept Pacific Fidelity's offer and to abrogate the agreement with American Home. The ensuing "supplemental" agreement executed by Pacific Fidelity and Bankers provided Bankers a flat rate of $1.25 per name and contains numerous other features similar to the abrogated American Home agreement.

In considering this motion for summary judgment, the court must look at the record in the light most favorable to the non-moving party and determine whether genuine issues as to material facts exist for determination by the trier of fact. If there are no genuine issues of material fact in dispute, the court may enter judgment as a matter of law.

The four separate bases for defendants' Rule 56 motion hereafter separately discussed are:

1) The McCarran-Ferguson Act insurance business exemption.
2) Plaintiffs' lack of standing to sue.
3) Absence of any allegations showing acts in or having any effect upon interstate commerce; and
4) Absence of any allegations indicating acts having anti-competitive effect or purpose.

McCARRAN-FERGUSON ACT

The McCarran-Ferguson Act [15 U.S.C. 1011 *et seq.*] provides that the "business of insurance" will be regulated by state law and, in the absence of coercion, intimidation, or

boycott, will not be subject to the federal antitrust laws. Thus, defendants reason, since their actions took place within "the business of insurance, it is beyond the reach of these plaintiffs in this court. The defendants' business activity attacked in the complaint is merely peripheral to the insurance business. In essence, Pacific Fidelity and American Home were competing for a list of Banker's customers and defendants cite no relevant authority for their position that the McCarran-Ferguson Act exempts *this* type of activity from the Sherman and Clayton Acts.

The role of insurance in our complex commercial society is pervasive. Insurance companies with their policies, their agents, and their customers touch and concern all commercial activity. The McCarran-Ferguson Act did not purport to make state legislation supreme in regulating all the activities of insurance *companies*. It does allow the states to regulate the *business* of insurance [*Securities Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 459 (1968)][1] but such business is not the subject of this litigation.

STANDING

Defendants' assertion that plaintiffs lack of standing to sue is without merit. Contrary to their argument, the Ninth Circuit recognized a private cause of action for persons foreseeably, albeit incidentally, harmed by antitrust violations that cause direct injury to a third party. *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971). Plaintiffs Volk and Devoto

1. *S.E.C. v. National*, *supra*, points out that the relationship between insurer and insured, the type of policy issued, its reliability, interpretation and enforcement are the core of the "business of insurance." The focus of the statutory term was on the relationship between the insurance company and the policy holder. 393 U.S. 458, 460 (1968).

were substantially and foreseeably affected by Bankers' abrogation of its agreement with American Home.

INTERSTATE COMMERCE

Defendants vigorously deny plaintiffs allegations that their conduct was directly in or affected interstate commerce. The court agrees.

The complaint and affidavit accompanying this motion show both plaintiffs to be residents of California. Defendants Pacific Fidelity Bankers Home, and plaintiffs' employer Market Placement are all California businesses with their principal places of business in California. Defendants uncontroverted affidavit states that all communications between the plaintiffs and all communications between Pacific Fidelity and Bankers occurred in California. American Home with general offices in New York City is admitted to have had interstate communications with Bankers but, as shown below, this fact does not provide Sherman Act jurisdiction.

Two tests are used to determine whether business activity involves interstate commerce: (1) whether the activity complained of occurred within the flow of interstate commerce or (2) whether the acts complained of, while intrastate, substantially affected interstate commerce. *Las Vegas Merchant Plumbers Association v. United States,* 210 F.2d 732, 739-740 n.3 (9th Cir. 1954). In the Ninth Circuit, the question is not whether the acts complained of affected a *business* engaged in interstate commerce but whether the acts affected *the interstate commerce part of the business. Sun Valley Disposal Co. v. Silver State Disposal Co.,* 420 F.2d 341, 343 (9th Cir. 1969). The court thus must consider whether the acts of Defendants Pacific Fidelity and/or

Bankers, which are the subject matter of this action, were in or substantially affected interstate commerce. The fact that the business of mortgage protection insurance involves and substantially affects interstate commerce is irrelevant to this question.

The acts of the defendants were conducted primarily in California. While it is true that notification of Banker's intent to breach its agreement with American Home was interstate, this is not the substance of the plaintiffs' action. The other actions of the defendants were essentially intrastate. Pacific Fidelity's attempts to induce Bankers to breach the agreement with American Home took place in California. All agreements between Pacific Fidelity and Bankers originated and were consummated in California. This activity therefore cannot be said to have been directly in the flow of interstate commerce. *Cartrade, Inc. v. Ford Dealers Adv. Assn. of Southern California,* 446 F.2d 289 (9th Cir. 1971).

Of course, liability is not contingent on the activity being directly "in" interstate commerce; it is sufficient that the activity substantially affect interstate commerce. Defendants argue that the breach did not substantially affect interstate commerce; indeed, it is their contention that the breach had *no* effect on interstate commerce.

The complaint and the affidavits before this court indicate that the intended consumers of the insurance programs, Bankers' mortgagors, were in California.[2] Even if this were not so, the insurance program eventually offered to

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2. In his opposition to this motion and in oral argument, plaintiffs' counsel represented to the court that some of Bankers' customers were in Nevada. However, this unsworn statement did not indicate a percentage, was not supported by affidavits and cannot be considered under Rule 56 of the F.R.Civ.P.

customers by Pacific Fidelity was essentially the same insurance that American Home had planned to offer. Plaintiffs have not indicated that the number of customers who purchased the mortgage protection insurance under the new Pacific Fidelity program was a substantial increase or decrease from the number who would have purchased the same program from American Home. Accordingly, since the court cannot assume that a change in insurance companies offering the same policy would greatly effect the number of policies eventually sold, there is no basis for believing that the acts of the defendants have had any, much less a substantial, effect on interstate commerce. The Ninth Circuit rule set out in *Cartrade, Inc. v. Ford Dealers Adv. Assn. of Southern California, supra,* compels this court to grant defendants' motion for summary judgment.

ANTI-COMPETITIVE EFFECT OR PURPOSE

Even had this court found the necessary interstate activity defendants' motion for summary judgment must still be granted. The alleged activity of Pacific Fidelity and Bankers is, as a matter of law, beyond the purview of Section 1 of the Sherman Act.

For the purposes of this action, Bankers was a mere supplier of names. They sold their customer list. Pacific Fidelity had been buying these lists since 1964. In 1968 American Home offered to buy the list from Bankers and Bankers found their offer more attractive than the existing arrangement with Pacific Fidelity. Pacific Fidelity, realizing it had been outbid for the list, made another offer to Bankers in an effort to save the contract. This second Pacific offer was striking similar to the American Home package and Bankers, *for reasons of their own which are not relevant here,* decided to resume its exclusive arrangement with Pacific Fidelity.

Competition in the sale of mortgage protection insurance and in the sale of the customer list was hardly restrained. On the contrary, there was an offer and counter-offer process that convinced Pacific Fidelity to revamp its mortgage protection insurance program with Bankers and to rebid for the customer list and Bankers' cooperation. Unfortunately for the plaintiffs and American Home, Pacific Fidelity was successful and regained the contract. The court points out that American Home was free to offer its mortgage insurance plan to Bankers' customers. Possession of the customer list and cooperation from Bankers in a direct mail solicitation would certainly have been helpful to American Home but the list merely facilitated the sale of insurance and its loss cannot be said to have foreclosed the possibility of their sale of insurance to Bankers' mortgagors by American Home.

Plaintiffs cite *Flinkote Co. v. Lysfjord,* 246 F.2d 368 (9th Cir. 1957) for the premise that an anticompetitive effect or purpose resulting from the refusal to deal with American Home is unlawful. *Flinkote* presented a clearly different situation than the instant case; in that case, there was evidence of a common scheme among plaintiff's competitors to drive him out of business by boycott. *There has been no suggestion that Pacific Fidelity, a competitor, and Bankers, a non-competitor, entered into a scheme to drive American Home out of the mortgage insurance business in California. Neither does the record show that Bankers and Pacific Fidelity were attempting to fix prices on the insurance policies.* No allegation has been made and no affidavits have been offered to show that Bankers "tied" the sale of Pacific Fidelity's insurance to the mortgage dealings with their customers. Plaintiffs' cited authority dealing with "tying" arrangements must be disregarded.

This case is closely analogous to the "refusal to deal" antitrust cases. The critical question is not whether there was a refusal to deal (or an inducement, or combination, to refuse to deal), but rather, whether the refusal to deal is so anticompetitive in purpose or effect as to be an unreasonable restraint of trade. *Alpha Distributing Co. of Calif. v. Jack Daniel Distillery,* 454 F.2d 442 (9th Cir. 1972), citing *Joseph Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71 (9th Cir. 1969); *Walker Distributing Company v. Lucky Lager Brewing Co.,* 323 F.2d 1 (9th Cir. 1963). The court finds that there are no genuine issues of material fact concerning the transaction between the parties. The record does not indicate that the anticompetitive effect, if any, that might have resulted unreasonably restrained trade. *Bankers' motive for breaching the agreement with American Home was based on business reasons.* Pacific Fidelity, spurred by American Home's bidding, revamped its old mortgage insurance package and matched American Home's offer. The court does not find either of these motives, nor the effect of the defendants' acts, to constitute an unreasonable restraint of trade under the rule of *Alpha Distributing Co.* and *Hawaiian Oke, supra.*

This court need not, and does not, express any opinions on the merits of possible state causes of action in tort or contract that might lie as a result of the defendants' actions.

For the reasons stated above, defendants' motion for summary judgment is hereby granted and plaintiffs' motion for partial summary judgment on the issue of liability is denied.

It is so ordered.

Dated: January 26, 1973.

Spencer Williams
UNITED STATES DISTRICT JUDGE

Appendix B

ORIGINAL
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CLERK U.S. COURT OF
APPEALS

United States Court of Appeals
For the Ninth Circuit

DAVID DEVOTO and CHARLES S. VOLK, *Plaintiffs-Appellants,* vs. PACIFIC FIDELITY LIFE INSURANCE CO. and BANKERS MORTGAGE CO. OF CALIFORNIA, *Defendants-Appellees.*	No. 73-1685 SW

On Appeal from the United States District Court
for the Northern District of California

Before: CHOY and GOODWIN, Circuit Judges, and
BEEKS,* District Judge

OPINION

BEEKS, District Judge:

Appellants appeal from an order of the district court granting summary judgment of dismissal. They allege a violation of Section 1 of the Sherman Act.[1] The court con-

*The Honorable William T. Beeks, Senior United States District Judge for the Western District of Washington, sitting by designation.

1. 15 U.S.C. § 1.

cluded that the acts complained of did not affect interstate commerce or manifest an anticompetitive purpose or effect.

Appellee Bankers Mortgage Company of California (hereinafter "Bankers") is in the business of making real estate loans in California and Nevada.[2] Appellee Pacific Fidelity Life Insurance Co. (hereinafter "Pacific") sells life, health and accident insurance throughout the United States. At all times relevant to this action both appellees were subsidiaries of the Transamerica Corporation.

One aspect of Pacific's business is the sale to mortgagors of mortgage protection insurance that guarantees payment of the mortgage in the event of the death or disability of the mortgagor. Bankers does not sell mortgage protection insurance, but in 1967 and 1968 it had an exclusive arrangement with Pacific whereby it supplied Pacific with a list of its mortgagors and cooperated in their direct mail solicitation. In exchange for these services, Bankers received commissions on mortgage protection policies sold by Pacific to Bankers' mortgagors.

During this period appellant DeVoto was conducting business under the name of Market Placement Agency. Market Placement provided special insurance programs to businesses throughout the Western United States. Appellant Volk was employed by it as a general agent. Late in 1967 Volk contacted Bankers and offered a new mortgage protection solicitation plan on behalf of American Home Assurance Company of New York (hereinafter "American"). The plan provided for the payment of $1.25 for each mortgagor's name supplied by Bankers, in addition to commissions on policies sold. Bankers accepted the plan and elected to sign a two-year contract with American and to

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2. In 1968 Bankers was the eighth largest mortgage banker in the United States (R. 322).

cease dealing on an exclusive basis with Pacific. Appellants were to receive commissions on insurance policies sold by American to Bankers' mortgagors.

American has its principal place of business in New York, and the contract contemplated that Bankers' mortgagors in California and Nevada would be serviced by American from its East Coast offices. Whereas Pacific offered life, health and accident insurance in the mortgage protection field, American offered only health and accident insurance. Under the post-1968 arrangement, therefore, Bankers' customers would potentially be receiving solicitation from both Pacific and American.

Disconcerted over the loss of its exclusive arrangement with Bankers, Pacific sought to match the American package and to persuade Bankers to reinstate the exclusive relationship. It met American's offer of $1.25 per name supplied, but there is some question as to whether Bankers would realize an equal amount in commissions with Pacific since the alleged facts suggest that, on the basis of past records, American enjoyed considerably better market penetration than did Pacific. That is, for a given number of names supplied by Bankers, American could expect to sell more insurance policies than could Pacific.

In any event, Pacific persuaded Bankers to abrogate its contract with American, and to return to its exclusive arrangement with Pacific. Pacific agreed to hold Bankers harmless against any liability arising out of Bankers' abrogation of the agreement with American. Appellees assert that the decision to abrogate the American contract was reached on the basis of pure business considerations. Appellants claim that the decision was made in consideration of the corporate relationship between Bankers and Pacific, and a desire to keep the business of mortgage protection insurance within the Transamerica "family."

Appellants brought this action under the jurisdictional grant of Section 4 of the Clayton Act,[3] alleging that the action of Bankers and Pacific manifests a combination in restraint of trade in violation of Section 1 of the Sherman Act. Appellees subsequently moved for summary judgment on the grounds that (1) the activities complained of occurred within the business of insurance, and thus are exempted from the antitrust laws by virtue of the McCarran-Ferguson Act,[4] (2) appellants lack standing to sue, (3) the acts complained of were not in, nor did they affect interstate commerce, nor did they (4) manifest an anticompetitive purpose or effect.

The district court ruled in favor of appellants on the first two issues, finding that the acts complained of were peripheral to the "business of insurance" and thus without the protective scope of McCarran-Ferguson; and that appellants were within the target area of the alleged antitrust violation and thus have standing to sue. These rulings are not before us on this appeal.

Summary judgment was granted on the basis of the two remaining issues: the court ruled that the acts complained of neither occurred in nor affected interstate commerce, and that they did not manifest an anticompetitive purpose or effect. We disagree.

I.

Jurisdiction under Section 1 of the Sherman Act exists only if the acts complained of occur within the flow of, or substantially affect interstate commerce.[5] Moreover, "the

3. 15 U.S.C. § 15.

4. 15 U.S.C. § 1011 *et seq.*

5. *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business."[6]

Appellees place much reliance on the fact that Bankers, Pacific and appellants are all residents of California, that the communications leading to the alleged combination all occurred within California, and that the mortgagors purchasing insurance under the contracts at issue are all residents of California.[7] Appellees argue that these substantial intrastate connections preclude a finding that the alleged combination occurred within the flow of or affected interstate commerce.

We do not reach the issue of whether the alleged violations occurred in interstate commerce. Our conclusion, set forth below, that the acts complained of substantially affect interstate commerce is sufficient to uphold jurisdiction under the Sherman Act and require setting aside the contrary ruling of the district court.

The court below found itself to be without jurisdiction on the basis of its finding that the insurance solicitation program ultimately submitted by Pacific was essentially the same as that offered by American, and that there was no evidence that substitution of Pacific for American would have any impact on the number of policies sold to Bankers' mortgagors. The court consequently found our holding in

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6. *Page v. Work*, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961).

7. It appears, however, that appellees' assertion that all of Bankers' mortgagors are located in California is not supported by the record. The evidence suggests that 93.4% of Bankers' mortgagors are located in California and that the remainder are located in Nevada. Determination of this factual issue is not essential to our decision on this appeal. On remand, however, the district court should reconsider its finding that Bankers' mortgagors are exclusively Californians.

Cartrade, Inc. v. Ford Dealers Adv. Ass'n of Southern California,[8] to require the conclusion that the alleged combination did not affect interstate commerce. The district court's reliance on *Cartrade* is misplaced.

The plaintiff in *Cartrade* was a company that arranged trades of Ford automobiles among members of the Ford Dealers Advertising Association of Southern California. When a customer desired a model that a particular dealer did not have in stock, the dealer would contact Cartrade who, for a fee, would consult its computer listings of all cars held in stock by member dealers and would advise the inquiring dealer of any other member dealers having in stock the requested model. The dealers could then exchange automobiles to their mutual benefit. The procedure assisted dealers to serve customers who desired a specific model and did not wish to wait while such a car was ordered and delivered from an out-of-state assembly plant. Cartrade enjoyed an exclusive relationship with member Ford dealers and was provided by Ford with the necessary computerized inventory listings.

This relationship was terminated by the Dealers Association, and Ford thereafter declined to supply Cartrade with the computer listings. Cartrade was thereby forced out of business, and it subsequently filed suit under Sections 1 and 2 of the Sherman Act.[9] This court upheld dismissal of the suit because, *inter alia*, the alleged activities did not affect interstate commerce. It was reasoned that the removal of Cartrade and the substitution of its successor might better serve the business interests of the dealers. Cartrade could not show that the substitution would hurt Ford auto sales or result in the importation of fewer Ford cars into Cali-

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8. 446 F.2d 289 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972).

9. 15 U.S.C. §§ 1, 2.

fornia. Cartrade's business itself was purely local, and interstate commerce in Ford cars could not be shown to be affected by the substitution of a successor car trader for Cartrade.

Cartrade is thus distinguishable from the present case in one critical respect: whereas in *Cartrade* the termination of local business relations did not affect the flow of interstate commerce, in the instant case the combination between Bankers and Pacific worked effectively to foreclose American from a significant segment of the California market for mortgage protection insurance. It essentially terminated the interstate flow of mortgagor lists, insurance policies, premiums and information with respect to Bankers' mortgagors.

Interstate insurance transactions fall within the definition of insurance commerce as that term is applied pursuant to federal antitrust regulation,[10] and "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[11]

II.

The district court held that the alleged acts of appellees did not manifest an anticompetitive purpose or effect, and, as a matter of law, were beyond the purview of Section 1 of the Sherman Act. The court found that Bankers abrogated its contract with American and resumed its exclusive relationship with Pacific "for business reasons," and "for reasons of their own which are not relevant here."

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10. *See, United States v. South-Eastern Underwriters Asso.*, 322 U.S. 533 (1944). Certain exemptions not relevant here are legislated in the McCarran-Ferguson Act, *supra* note 3.

11. *United States v. Women's Sportswear Manufacturing Association*, 336 U.S. 460, 464 (1949).

Viewing the evidence as a whole and the inferences which may be drawn therefrom in the light most favorable to appellants, as we must,[12] the record clearly supports the contentions that (1) the American package was equal if not superior to that finally offered by Pacific, and (2) that Bankers based its decision to abrogate the American contract and to resume its exclusive relationship with Pacific upon its desire to keep the business of mortgage protection insurance within the Transamerica corporate group. So viewed, the record reveals anticompetitive conduct falling within the proscriptive sweep of Section 1 of the Sherman Act.

In *FTC v. Consolidated Foods Corp.*[13] the FTC invoked Section 7 of the Clayton Act[14] to challenge Consolidated's acquisition of Gentry, Inc. Consolidated was a large manufacturer of processed foods, and Gentry was a manufacturer of dehydrated onion and garlic. Consolidated purchased numerous food products from suppliers who were, in turn, purchasers of dehydrated onion and garlic. The Supreme Court upheld the finding of the Commission that the effect of the acquisition "may be substantially to lessen competition."[15] In practical terms, Consolidated would be able to exert the considerable leverage manifest in its purchasing power to coerce its suppliers to buy from Gentry, the Consolidated subsidiary. The Court observed that

> ". . . the 'reciprocity' made possible by such an acquisition is one of the congeries of anticompetitive practices at which the antitrust laws are aimed. The practice results in 'an irrelevant and alien factor,' . . . intruding

12. *Consolidated Electric Co. v. United States*, 355 F.2d 437 (9th Cir. 1966).

13. 380 U.S. 592 (1965).

14. 15 U.S.C. § 18.

15. 380 U.S. at 593.

into the choice among competing products, creating at the least 'a priority on the business at equal prices.' "[16]

Likewise, in *International Salt Co. v. United States,*[17] a reciprocal arrangement under which International leased certain of its patented machines on the condition that the lessees would use therein only International's products, was found to violate the Sherman Act even though International agreed to meet the prices offered by competing suppliers. Again, the Court noted the anticompetitive effect of an agreement that gave the defendant a priority on the business at equal prices.[18]

If, as alleged, Pacific had only to match the package offered by American to induce Bankers to abrogate the American contract, then Pacific enjoyed a priority on the business at equal prices. This priority is attributed to its corporate relationship with Bankers. This relationship is a factor over which an outsider such as American has no control, and with which it cannot hope to compete. It is a factor unrelated to traditional competitive elements such as product price, quality and marketability. It is an "irrelevant and alien factor" that, when allowed to intrude into the free marketplace, produces an anticompetitive effect such as the antitrust laws were designed to combat.[19]

Appellees urge that our holding in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*[20] is to the contrary. In that case a liquor distributor that enjoyed an exclusive contract to distribute the products of the defend-

16. 380 U.S. at 594.

17. 332 U.S. 392 (1947).

18. *See also, Northern Pac. R. Co. v. United States,* 356 U.S. 1 (1958).

19. *FTC v. Consolidated Foods Corp., supra* note 12.

20. 416 F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062, *reh. denied,* 397 U.S. 1003 (1970).

ant distillers was terminated, and the distribution rights were contracted to another. Several of the defendant distillers were members of the multicorporation "Seagram group." It was alleged by the plaintiff therein that defendants conspired to take his business away from him in violation of Section 1 of the Sherman Act. This court disagreed, holding that absent anticompetitive intent, termination of a distributor is a proper business option. We held that the alleged conspiracy, the negotiations between the several distillers and the new distributor, was designed merely to ascertain and insure that the proposed distribution system would be viable. We concluded that there was no unreasonable restraint of trade.

The *Seagram* case may, however, be distinguished from the case before us. In *Seagram* there was no breach of contract. An existing contract was simply allowed to expire. This is relevant to our determination in *Seagram* that traditional competitive factors led to the termination: there was no evidence suggesting that any factors other than traditional business considerations were weighed pursuant to reaching the decision to change distributors. Neither plaintiff therein nor the defendant distributor was a member of the Seagram corporate family. There was thus no suggestion that the termination was effected for the purpose of keeping the distribution business within the Seagram group. In *Seagram* we did not consider that issue.

The view of the evidence most favorable to appellants here suggests that Pacific had achieved a priority on the business at equal prices as a result of its corporate affiliation with Bankers. Consequently, an issue of fact is presented as to whether the American contract was abrogated in consideration of this anticompetitive element, or, alternatively, in consideration of factors properly cognizable in

the free market system. In light of the existence of this factual issue, summary dismissal was improvidently granted.

Reversed, and remanded for further proceedings in accordance herewith.

Appendix C

ORIGINAL
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CLERK, U. S. DIST. COURT
SAN FRANCISCO

In the United States District Court
For the Northern District of California

DAVID DEVOTO and CHARLES F. VOLK, *Plaintiffs,* vs. PACIFIC FIDELITY LIFE INSURANCE COMPANY and BANKERS MORTGAGE COMPANY OF CALIFORNIA, *Defendants.*	No. C-70-1509 SW

ORDER DENYING MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR A NEW TRIAL
and
ORDER AWARDING A REASONABLE ATTORNEY'S FEE

The defendants having moved this Court for judgment notwithstanding the verdict and/or for new trial and the plaintiffs having filed their application for a reasonable attorney's fee pursuant to Section 4 of the Clayton Act (15 U.S.C. 15), and the Court having read the briefs, heard argument, and being fully advised in the premises, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) That the defendants' motions for judgment notwithstanding the verdict and/or new trial are denied; and

(2) That pursuant to Section 4 of the Clayton Act (15 U.S.C. 15) and after having considered the usual standards and criteria, the plaintiffs are awarded $85,000 as a reasonable attorneys' fee.

Dated: 5-11-76

SPENCER WILLIAMS
Spencer Williams
Judge, United States
District Court

Appendix D

United States Court of Appeals
For the Ninth Circuit

FILED
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RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

DAVID DEVOTO and CHARLES S. VOLK, *Plaintiffs-Appellees,* vs. PACIFIC FIDELITY LIFE INSURANCE COMPANY and BANKERS MORTGAGE COMPANY OF CALIF., *Defendants-Appellants.*	No. 76-2303

OPINION

Appeal from the United States District Court
For the Northern District of California

Before: TRASK and KENNEDY, Circuit Judges, and TURRENTINE,* District Judge.

KENNEDY, Circuit Judge:

This is an appeal from a judgment for damages entered against the defendants (appellants here) on two separate claims, each presenting significant questions for our decision. The first claim was based on section 1 of the Sherman Act. 15 U.S.C. § 1 (1976). The second, arising out of the same transaction, alleged a pendent state claim for tortious

*Honorable Howard B. Turrentine, United States District Judge for the Southern District of California, sitting by designation.

interference with prospective business advantage. The appeal as to that aspect of the case raises an interesting question, apparently one of first impression under California law, concerning essential elements in the definition of the tort. We previously reversed a summary judgment of dismissal granted in favor of the defendants on the antitrust claim. *DeVoto v. Pacific Fidelity Life Ins. Co.*, 516 F.2d 1 (9th Cir.), *cert. denied*, 423 U.S. 894 (1975) (*DeVoto I*). After a trial on remand the jury returned verdicts for the plaintiffs on both claims with damages (before trebling on the antitrust count) of $109,375.[1] In this court the defendants challenge the judgment on each claim. The facts are set out in greater detail in *DeVoto I*. Briefly, the situation is as follows: Pacific Fidelity Life Insurance Company (Pacific) and American Home Assurance Company of New York (American) are two companies which, among other business activities, sell mortgage protection insurance to mortgagors to effect payment of the mortgage in the event of the death or disability of the mortgagor. Bankers Mortgage Company of California (Bankers) is in the business of making real estate loans in California and Nevada. Bankers and Pacific are both subsidiaries of the Transamerica Corporation, but Bankers initially entered into a contract with American. By the terms of the agreement, Bankers provided American with a list of mortgagors' names and received a fee for the names supplied, in addition to a commission for each policy sold. Pacific persuaded Bankers to abrogate the contract with American and to enter into an arrangement with Pacific instead. American is not a party to this action; rather, the suit was brought

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1. The jury found damages in the amount of $125,000 but reduced the figure by one-eighth because a party holding a one-eighth interest in plaintiffs' business had not sued.

by two individuals, appellees here and plaintiffs below, who were responsible for bringing Bankers and American together and who expected agents' commissions from any income American earned from its contract with Bankers. Plaintiffs contend that Bankers' decision to abrogate the American contract was based on the corporate relationship between Bankers and Pacific, and resulted from pressure to keep the business of mortgage protection insurance within the Transamerica family.

Antitrust Claim

In *DeVoto I,* we determined that plaintiffs had standing and that their allegations were sufficient to state a claim for relief;[2] we must now determine whether the evidence adduced at trial was sufficient to carry plaintiffs' burden of proof. We conclude that it was not.

At the outset, it must be said that the defendants' actions are to be judged by the rule of reason, not by a per se rule. Even assuming that the package offered by American was more desirable than Pacific's and that Bankers cancelled Pacific's contract solely for the purpose of keeping the business in the Transamerica family, that does not constitute a per se violation of the antitrust laws. We think this point was established by our opinion in *DeVoto*

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2. Our holding that Sherman Act liability was not established makes it unnecessary to examine whether the *DeVoto I* holding—that brokers may bring the antitrust claim—survives the intervening decisions by the Supreme Court in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), and Brunswick Co. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477 (1977); *see* John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495 (9th Cir. 1977). The cited, more recent cases are consistent with our conclusion that brokers may not recover on the state law tort claim on these facts. Even if our analysis in *DeVoto I* were not consistent with our discussion of the California law, issues of antitrust and tort standing are not necessarily so isomorphous that each analysis may not stand on its own.

I. The court noted there that the corporate relationship between Bankers and Pacific "when allowed to intrude into the free marketplace, *may produce* an anticompetitive effect such as the antitrust laws were designed to combat." 516 F.2d at 6 (footnote omitted) (emphasis added). The court went on to hold that "[a]n *issue of fact* is presented as to whether in breach of the American contract, the defendants intended to, or did, *unreasonably* restrain trade in violation of § 1 of the Sherman Act." Id. at 6-7 (emphasis added).

Moreover, we do not believe a per se rule is appropriate in this type of case. The court has warned that "additions to the limited per se list are not to be made on an *ad hoc* basis. At least they are not to be made without evidence supporting a determination that the restraint is such as to have a pernicious effect on competition." *Gough v. Rossmoor Corp.,* 585 F.2d 381, 388 (9th Cir. 1978), *cert. denied,* 440 U.S. 936 (1979). *See Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977). There are not sufficient grounds to conclude that business decisions based on favoring corporate affiliations automatically must be condemned. *See White Motor Co. v. United States,* 372 U.S. 253, 263 (1963). We believe that such decisions may not be wholly without justification in some cases. Particularly in long term relationships, there may be economies in dealing with friends because there is a greater likelihood of amicable resolution of disagreements. The Supreme Court has noted, in the context of mergers, that a corporate subsidiary will in all probability deal only with its affiliate for goods the affiliate can furnish, but that fact alone does not make an acquisition invalid. *United States v. Columbia Steel Co.,* 334 U.S. 495, 523 (1948). We are not prepared to expand the very limited list of per se offenses to include the conduct at issue in this case.

Of course, if such arrangements are not always injurious neither are they wholly commendable because, as *DeVoto I* points out, they introduce an "irrelevant and alien factor" into the free marketplace which may have anticompetitive effects. Upon those grounds we remanded for a factual inquiry into whether the practice was in this case unreasonable.

Turning now to a rule of reason analysis, we must determine whether the plaintiffs below carried their burden of proof. A crucial aspect of a plaintiff's case under the rule of reason is a demonstration that the alleged conduct of the defendant had some market impact. *See Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 615 (1953); *Associated Press v. United States,* 326 U.S. 1, 27 (1945) (Frankfurter, J., concurring); *American Motor Inns, Inc. v. Holiday Inns, Inc.,* 521 F.2d 1230, 1247 (3d Cir. 1975). As this court recently stated, "Unless the alleged anticompetitive conduct is per se unreasonable, the fact that the conduct restrained trade in a relevant market is an essential part of a plaintiff's case . . . and the burden of establishing it lies on him." *Gough v. Rossmoor Corp.,* 585 F.2d 381, 385 (9th Cir. 1978), *cert. denied,* 440 U.S. 936 (1979). This court and others have repeatedly emphasized that "[t]he antitrust laws . . . were enacted for 'the protection of *competition,* not *competitors,*'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977) (quoted in *Gough, supra,* 585 F.2d at 386) (emphasis in original) (citation omitted), and therefore the plaintiff must show something more than simply an adverse effect on his own business; he must show "an adverse impact on the competitive conditions in general as they exist within the field of commerce in which the plaintiff is engaged." *Gough supra,* 585 F.2d at 386. Absent per se violation, competitive in-

juries must be defined in terms of a discrete market. The parties stipulated at trial that the relevant market for purposes of this case is the market for the sale of mortgage protection insurance in California, which consists of all residential mortgagors in the State of California whose loans are serviced by mortgage bankers, savings and loan associations or commercial banks. Thus the question narrows to the nature and extent of anti-competitive practices in the market for the sale of mortgage protection insurance in California and whether or not such practices, in that market, were unreasonable.

The Supreme Court has stated that the appropriate focus in determining reasonableness under section 1 focuses on "the percentage of business controlled, the strength of the remaining competition, [and] whether the action springs from business requirements or purpose to monopolize." *United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948) (quoted in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 615 (1953)). The parties stipulated that for the years in question the number of such residential mortgagors averaged in excess of 2,750,000, with an average outstanding principal balance of in excess of $50 billion and that Bankers' share of this market for this period averaged about 32,000 mortgagors with a remaining principal balance of slightly *in excess of $500 million.* This means that the percentage of the relevant market affected by defendants' actions was slightly more than 1%. We have not found any cases in which an impact on this small a percentage of the relevant market was held to be unreasonable nor have plaintiffs cited any to us. *See* 16 J. Von Kalinowski, Business Organizations § 6.02[4] at 6-141 (1969).

On the facts of this case, moreover, it is not even clear that there has been an adverse effect on the 1% of the

market in question. The only market effect about which there was any evidence concerns the quality of the product offered to consumers; plaintiffs allege that the insurance policy which Pacific offered was less desirable than American's. Even assuming the allegation to be true, however, Bankers' mortgagors were not required to buy Pacific's or any other mortgage insurance. If American offered a better insurance policy, consumers were free to buy it. The most that can be said for the actions of defendants is that they reduced the likelihood that consumers would learn of the allegedly better policy. *See Gough, supra,* 585 F.2d at 387 n.8.

Plaintiffs apparently contend that despite the very small percentage impact on the relevant market, a violation of the rule of reason can be demonstrated merely by reference to the dollar volume of commerce affected by the alleged restraint. Plaintiffs note that Bankers had about 32,000 individual mortgagors with outstanding principal balances exceeding $500,000,000 in total. They contend that plaintiffs intended to exclude American from this market and that showing this exclusion is sufficient to carry the burden of demonstrating injury. To the extent this argument is an attempt to redefine the relevant market, it is precluded by the parties' stipulation. *See American Motor Inns, Inc. v. Holiday Inns, Inc.,* 521 F.2d 1230, 1244 (3d Cir. 1975). Reliance on the absolute volume of commerce affected appears, moreover, to be misplaced.

The Supreme Court, in applying the rule of reason to mergers, has held that "[i]n determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance." *United States v. Columbia Steel Co.,* 334 U.S. 495, 527 (1948). Plaintiffs nonetheless attempt to rely on the dollar volume of commerce affected as dispositive by characterizing the actions at issue

in this case as a form of reciprocal dealing. *See FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965). One court has suggested in dictum that a reciprocity agreement covering a substantial volume of commerce would be unlawful without regard to the percentage of the market involved. *United States v. General Dynamics Corp.*, 258 F. Supp. 36, 66-67 (S.D.N.Y. 1966); *see* L. Sullivan, Handbook of the Law of Antitrust § 171 at 494 (1977). Whatever the proper line of analysis in reciprocity cases, it is not applicable to the facts shown in this case.

Bankers is essentially selling a list of names of its mortgagors; Pacific and American both tried to buy the list and Bankers ultimately sold to Pacific. The concern with respect to reciprocity is that a firm with power in one market as a seller will exercise that power to gain an advantage as a buyer in a different market. This is very similar to the concern with tying arrangements. *See L. Sullivan, supra,* § 170 at 491. In the case at hand there is absolutely no evidence that the deal between Bankers and Pacific was made with any expectation or intention that Bankers would gain an advantage as a buyer of a product supplied by Pacific. As Professor Sullivan notes, "the need is not merely to find agreement, but to find a purchase made with reciprocal motive." *Id.* § 171 at 494. There was a failure to prove that the acts of defendants were part of a plan to encourage reciprocal dealing that resulted in a competitive injury, *cf. FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965), or any analogous form of prohibited restraint.

In their attempt to demonstrate market impact plaintiffs argue that *DeVoto I* is a conclusive decision that there was a significant adverse market effect. They point to the conclusion in *DeVoto I* that plaintiffs had met the jurisdictional requirement that the "acts complained of occur within the

flow of, or substantially affect interstate commerce." *DeVoto I, supra,* 516 F.2d at 4. The jurisdictional issue is distinct, however, from the substantive issue of whether a given defendant's conduct was an unreasonable restraint of trade under the Sherman Act. *Gough v. Rossmoor Corp.,* 487 F.2d 373, 376 (9th Cir. 1973); *Cartrade, Inc. v. Ford Dealers Advertising Ass'n,* 446 F.2d 289, 292 (9th Cir. 1971).

Plaintiffs failed to introduce any evidence to support a finding that there was an adverse effect on the relevant market. They have not shown that viewing the relevant market as a whole there was any effect on the price, quality or quantity of mortgage insurance, nor have they shown that there have been any effects on the structure of the market which might adversely affect the climate for competition. *See Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 53 n.21 (1977). This court's observation in *Mutual Fund Investors, Inc. v. Putnam Management Co., Inc.,* 553 F.2d 620, 627 (9th Cir. 1977) is equally applicable to the case at hand: "Appellants point to the alleged injury to their businesses, but fail to provide any evidence that the 'effect upon competition in the marketplace is substantially adverse'" (citation omitted).

Plaintiffs suggest that if Bankers' decision were based solely on corporate affiliation that is the equivalent of an intent to impose an unreasonable restraint on trade and no more need be shown. Plaintiffs apparently rely on the statement in *United States v. Columbia Steel Co.,* 334 U.S. 495, 522 (1948), that "[a] restraint may be unreasonable . . . [when] a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint." In this case, the only intent to which plaintiffs point is the defendants' intent to give preference to an affiliated company. There is no allegation or evidence that defendants'

conduct was intended to fix prices, drive a competitor out of business or otherwise affect the market in question. As discussed earlier, giving preference to an affiliate sometimes causes a forbidden restraint and sometimes does not. This is not a case where the defendant intended a result beyond what was actually achieved; defendants intended exactly the result which occurred, and we have held that the result which occurred was not an unreasonable restraint of trade. The result was not unreasonable, and it follows that an intent to achieve that result, without more, is not unreasonable. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3d Cir. 1975).

State Tort Claim

Independently of the antitrust claims, the plaintiffs below sought relief upon a second theory, alleging tortious interference with their prospective business advantage.[3] They claimed commissions would have been paid to them as brokers for negotiation of the Banker-American agreement and that the commissions were a business advantage lost as a result of Pacific's inducing Bankers to repudiate the contract.

Bankers and Pacific defend by saying the inducement of the breach was done without any intent to cause injury to

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3. The district court instructed the jury as follows:

> There are no hard and fast rules governing whether or not a person is privileged to interfere with the contractual or business relations of another. In general, however, whether an intentional interference is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances including the nature of defendants' conduct and the relationship between the parties. The burden of proof is on the defendants to establish a justification that there be [*sic*].

Reporter's Transcript at 1338.

the brokers. The argument is not quite precise, for it should be phrased in terms of motive or specific purpose, not simply intent. When stated in this manner, we find the contention has merit, and we rule that plaintiffs' judgment for tortious interference must be reversed because there was no evidence of any motive or purpose to injure them.[4]

Tort law ordinarily imputes to an actor the intention to cause the natural and probable consequences of his conduct. *See* Restatement (Second) of Torts § 8A (1965). If the case turned on the issue of defendants' intent in this sense of the term, we would say the trier of fact could find that the defendants had the necessary state of mind to harm the brokers, for they were aware of the brokers' business relation and knew its disruption was substantially certain to follow once the principal contract with American was abrogated.

Tortious interference requires a state of mind and a purpose more culpable than "intent" under the Restatement definition, however. The fact of a general intent to interfere, under a definition that includes imputed knowledge of consequences, does not alone suffice to impose liability. Inquiry into the motive or purpose of the actor is necessary. The inducement of a breach, therefore, does not always vest third or incidental persons with a tort action against the one who interfered. Where the actor's conduct is not criminal or fraudulent, and absent some other aggravating

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4. Most of appellants' arguments on the pendent state claim rely on assertion of privileges. These arguments are wholly without merit: appellants cite no case in which privileged competition involved inducing a breach of contract (as here, the contract between Bankers and American) or in which an affiliation such as that between Bankers and Pacific gave rise to a privilege. *See generally* Buckaloo v. Johnson, 14 C.3d 815, 828 (1975); Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 36 (1941); Winn v. McCulloch Corp., 60 Cal. App. 3d 663, 673, 131 Cal. Rptr. 597 (1976); Culcal Styleo, Inc. v. Vornado, Inc., 26 Cal. App. 3d 879, 882 (1972).

circumstances, it is necessary to identify those whom the actor had a specific motive or purpose to injure by his interference and to limit liability accordingly. The extent of liability, for this tort, is fixed in part by the motive or purpose of the actor. *See* Restatement (Second) of Torts § 766 & Comment j and § 767 & Comment d (1979).

We note at the outset a scarcity of pertinent authority on this issue. Although we do not find controlling precedent in California case law, or closely similar cases in other jurisdictions, we are confident the result we reach is consistent with the law California courts would announce if the issue were presented to them. Analysis of purpose and motive in the tort of business interference is not well developed in the case law, but a survey of the authorities in California and other jurisdictions illustrates the specific kinds of wrong the tort is intended to redress and clarifies why the defendants' actions in this case are not tortious as to these plaintiffs.

The simplest case for allowing recovery is when there is an intended wrongful economic appropriation, as when the act of a defendant directly diminishes the value of the plaintiff's interest and simultaneously or subsequently transfers that value to the defendant. Thus a competitor may be liable for commission of the tort if he intentionally interferes with a contract to which he is a stranger for the otherwise legitimate purpose of improving his competitive position at the expense of the plaintiffs. *See Imperial Ice Co. v. Rossier,* 18 Cal. 2d 33, 112 P.2d 631 (1941). An example of such tortious interference occurred in this case when Pacific induced the breach of the principal contract in order to transfer American's competitive advantage to itself, and we assume such conduct would be actionable in a suit by American.

The wrongful appropriation may be by means other than interference with a formal contractual relation or a prospective business advantage. An example of such tortious interference, by a direct means of appropriation, is when two parties in a transaction cut out an agent or middleman and implicitly split between them the value of the lost commission. *See Buckaloo v. Johnson,* 14 Cal. 3d 815, 537 P.2d 865 (1975); *Herron v. State Farm Mutual Ins. Co.,* 56 Cal. 2d 202, 14 Cal. Rptr. 294, 63 P.2d 310 (1961); *Siciliano v. Fireman's Fund Ins. Co.,* 62 Cal. App. 3d 745, 133 Cal. Rptr. 745 (1976). In these cases defendant has a motive to secure the business advantage which formerly belonged to the plaintiffs, and that motive is an essential part of the finding that the means of the appropriation is unjust. By contrast, where a contract has been abrogated, competitors may thereafter offer to deal with the party who repudiated the contract without incurring liability in tort: there is no act of inducement, and once the contract is abrogated there is no advantage to appropriate. *See Imperial Ice Co. v. Rossier, supra,* 18 Cal. 2d at 38-39, 112 P.2d at 634; Restatement (Second) of Torts § 766, Comments h, n (1979).

There are also cases where tortious interference is accomplished by a more indirect means. For instance, where the defendant acquired a business after depressing its value by telling prospective purchasers the defendant's contract with the business would not be renewed, the statements were held tortious in a suit brought by the company. *Lowell v. Mother's Cake and Cookie Co.,* 79 Cal. App. 3d 13, 144 Cal. Rptr. 664 (1978). The court justified its finding of improper interference in terms of the defendant's motive or purpose. "It is underscored that the cases involving interference with prospective business advantage have turned

almost entirely upon *defendant's motive or purpose.*" (emphasis in original) (citation omitted). *Id.*, 79 Cal. App. 3d at 18. Motive and purpose are also central to the concept that interference inspired by ill will or spite may be tortious. *See* Restatement (Second) of Torts § 766, Comments r, s (1979).

In all these instances of contractual or business interference, some identifiable benefit accrues to the defendant which formerly belonged to the plaintiff, be it pecuniary or competitive.[5] The defendant's spiteful satisfaction of an earlier grievance against the plaintiff would be a similar injury. It is the intentional attainment of an unjust advantage which underlies the requirement that the interference be improper, Restatement (Second) of Torts § 767 (1979), and motive or purpose is usually an accurate measure of the advantage the actor sought and of its just or unjust character.

In the instant case no purpose to injure the plaintiffs was demonstrated. The business relation between the brokers and American was of no concern to the defendants. Commissions anticipated by the broker did not, in any degree, motivate the defendants' interference with the contract between Bankers and American. The object of the interference was the principal contract, not the brokers' arrangement incidental to it. The brokers and their commissions were entirely unrelated to any motivation of the defendants, and it was not the goal or design of the interference to acquire the value of the commission. Absent a motive or purpose to injure the plaintiffs, or to appropriate an economic advantage belonging to them, or some other

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5. This idea may also be expressed in other terms: whether or not the plaintiff has, as against defendant, a "property" right in the invaded interest, *see* Note, *Interference With Contractual Relations: A Property Limitation,* 18 Stan. L. Rev. 1406 (1966).

aggravating circumstances, the acts of Bankers or Pacific were not tortious as to the plaintiffs. The plaintiffs failed to establish these essential elements.

We have identified one class of cases in which recovery appears to have been allowed even though there is no improper purpose or advantage-taking by the defendant in relation to an interest owned or protected by the plaintiff. These involve a prospective purchaser who has asked a broker to negotiate the sale of property to him on specified terms, the broker's commission to be paid by the vendor. The purchaser in these circumstances has been held liable for tortious interference with the contract or relation between the vendor and the broker when he decides at the last minute not to buy the property, even when his contract breach is based upon an understandable reason, such as financial difficulty. The following cases comprise the evolution of this somewhate obscure line of authority: *Buono Sales, Inc. v. Chrysler Motors Corp.*, 363 F.2d 43, 49 (3d Cir.) (en banc), *cert. denied*, 385 U.S. 971 (1966); *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843, 859-61 (1967); *Tanner Associates, Inc. v. Ciraldo*, 58 N.J. Super 398, 156 A.2d 289, 290 (1959), *rev'd*, 33 N.J. 51, 161 A.2d 725 (1960); *McKnight v. McGuire*, 117 Misc. Rep. 306, 191 N.Y.S. 323 (Sup. Ct. 1921) (Lehman, J.); *James v. Home of the Sons and Daughters of Israel*, 153 N.Y.S. 169 (Sup. Ct. 1915); *Livermore v. Crane*, 26 Wash. 529, 67 P. 221 (1901.) In these instances, however, there has been a prior relation between the defendant and the plaintiff leading the former to rely upon the latter, and we think recovery is explained as easily by contract as by tortious interference, although concedely it is the latter ground which is the explicit rationale given in the opinions.[6] In the case before

6. This reliance exception is close to the facts of the *J'Aire* case, discussed below.

us there was no subsisting economic or business relation between the brokers on the one hand, and Bankers or Pacific on the other, except to the extent that the brokers became acquainted with Bankers through the negotiation, a circumstance which does not suffice for the imposition of liability.

Our opinion is not affected by the California Supreme Court's recent decision in *J'Aire Corp. v. Gregory,* 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60 (1979).[7] *J'Aire* considered the allegations necessary to state a cause of action for negligent interference with prospective economic advantage, rather than intentional interference, as here.[8] Negligent interference was not pleaded here, but our responsibility to decide the instant case under California law requires, we think, an inquiry whether the *J'Aire* decision implies that the California Supreme Court would alter the current definition of the intentional tort to permit recovery for DeVoto and Volk. We conclude that it would not.

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7. *J'Aire* impliedly disapproves the decision of this court in Standard Oil Co. v. United States, 153 F.2d 958 (9th Cir. 1946), *aff'd,* 332 U.S. 301 (1947).

8. The court in *J'Aire* explained its holding by listing six criteria:

> (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm.

24 Cal. 3d at 804, 598 P.2d at 63. Whether these criteria are requisite elements of a cause of action, or merely considerations to be blended from case to case, was not decided by the court, but we assume the latter. Although the scope of the California court's expansion of the tort of negligent interference is as yet unclear, we note that so far it has only been applied in a case that is roughly similar to third party beneficiary cases. *See also* Heyer v. Flaig, 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P.2d 161 (1969); Lucas v. Hamm, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961); Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958).

Our conclusion rests on the difference between the purpose of an intentional interference cause of action and the purpose of the cause of action established by *J'Aire*. The former cause of action tends to restrain impermissible behavior in the marketplace between competitors: it sets forth the ground rules of competition to confine business rivalry within acceptable bounds of conduct. Prosser, Law of Torts 952-62 (4th ed. 1971).

Two different considerations animate the California Supreme Court's *J'Aire* decision; both concerns are for the purpose of preventing rigid categories of the injured party's status or the nature of his injury from obscuring the more fundamental inquiry into the scope of an actor's legally foreseeable impact and thus liability. Specifically, the California court's opinion emphasizes that one may assume obligations by a contract that is in turn motivated in part by the promisee's desire to benefit third parties and in which contract third-parties are thereby interested, and for the unsatisfactory performance of which they may recover. The court also showed concern lest an injury due to negligence go unredressed simply because an intangible economic interest rather than a tangible one was injured. When the wrongful act is the same, the ability to recover should not hang on the fortuity of whether the injury is to the physical assets of a business rather than to its good will.[9] The fundamental inquiry is of course different in the case of intentional torts. Foreseeability is not at issue because it is not a requisite to recovery. Since all consequences, no matter how remote, harming a party with a cause of action for an intentional tort give rise to defend-

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9. This conforms with the broad language of California's negligence principle, *see* Cal. Civ. Code § 1714(a) (West 1973); Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968); 4 B. Witkin, Summary of California Law § 391A, pp. 98-101 (Supp. 1978).

ant's liability, the inquiry focuses on the inherent and relational quality of the wrongful act rather than on the foreseeability of its consequences. *See* 4 B. Witkin, Summary of California Law § 9, p. 2309 (1974); *Epstein, Intentional Harms,* 4 J. Legal Stud. 391 (1975), Note, *The Tie That Binds: Liability of International Tort-Feasors for Extended Consequences,* 14 Stan. L. Rev. 362, 367 (1962) (suggesting liability-limiting principles in intentional torts deficient by comparison with negligent torts, where foreseeability provides limiting principle).

This brief discussion of two significantly different causes of action suggests why different principles have come to govern different kinds of wrongful acts even though these acts may incidentally produce similar effects. For the foregoing reasons we do not interpret the California Supreme Court in *J'Aire* to have undone, by silent implication, the established case law on intentional interference with economic advantage by its decision in the separate area of negligent interference.

Even if we were to assume that something like the six criteria of *J'Aire* would replace the definition of the intentional tort as we have outlined it above, we do not think that the brokers would be entitled to recover. The nature of the brokers' business risks and the speculative quality of damages from lost commissions—to be calculated on the basis of the volume of sales that never occurred are two factors specifically enumerated by the California court as precluding recovery. *See J'Aire, supra,* 24 Cal. 3d at 808, 598 P.2d at 65-66.[10]

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10. *I.e.,* the plaintiffs here were more remotely related to the principal transaction—between Bankers and American—than were the plaintiffs in *J'Aire,* which relates to criteria (1) and (4), *see* note 8 *supra,* and the moral and public policy considerations, as well as the certainty of the damages suffered, are weaker here than in *J'Aire,* which relates to criteria (3), (5), and (6). *See* note 8 *supra.*

The facts of the case before us, examined in the light of our analysis of the tort of interference with business advantage, lead us to conclude that the defendants have no liability to the plaintiffs and that the judgment entered for the plaintiffs must be reversed.

The defendants have argued additional grounds for reversal of the judgment, matters which turn on the applicability of the statute of limitations and on the trial court's evidentiary rulings admitting certain testimony on the issue of damages. In our view the plaintiffs have not countered these contentions with convincing reasons, but it is unnecessary for us to address them in view of our holding on the primary issue of tortious liability.

Each party shall bear its own costs on this appeal.

REVERSED.

Supreme Court, U. S.
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No. 80-27

In the
Supreme Court of the United States

OCTOBER TERM, 1980

DAVID DEVOTO and CHARLES F. VOLK,
Petitioners,

vs.

PACIFIC FIDELITY LIFE INSURANCE CO. and
BANKERS MORTGAGE COMPANY OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondents' Brief in Opposition

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Respondents' Brief in Opposition

Respondents Pacific Fidelity Life Insurance Company and Bankers Mortgage Company of California respectfully request that this Court deny the petition for writ of certiorari, seeking review of the judgment and opinion of the Court of Appeals for the Ninth Circuit, reported at 618 F.2d 1340.

REASONS FOR DENYING THE WRIT

1. Neither of the Questions Presented in the Petition Was Raised Below.

The petition seeks to present two questions for review: first, whether respondents' alleged conduct should have

been judged by *per se* analysis rather than the rule of reason; and second, whether reversal of the jury verdict in favor of petitioners denied them the right to trial by jury.

Neither question was presented to the District Court or the Court of Appeals. Both are raised for the first time in these proceedings in the petition to this Court.

It has long been the policy of this Court not to review questions not raised below, absent "exceptional circumstances." *United States v. Lovasco,* 431 U.S. 783, 788 n.7 (1977). No exceptional circumstances are suggested by the petition. Indeed, the protracted course of the proceedings below and in this Court, as detailed at pages 3-5 of the petition, confirms precisely the opposite. If petitioners seriously believed *per se* analysis had any application to this case, they had many opportunities to urge it during the past ten years:

1. 1970, opposition to motion to dismiss;
2. 1972, opposition to motion for summary judgment;
3. 1974, opening and reply briefs to the Ninth Circuit in first appeal;
4. 1975, opposition to petition for rehearing;
5. 1975, opposition to petition for certiorari;
6. 1976, trial brief and proposed jury instructions;
7. 1976, brief in opposition to post-trial motions;
8. 1977, brief to the Ninth Circuit in second appeal;
9. 1980, petition for rehearing.

The use of rule of reason analysis in the 1975 opinion of the Ninth Circuit in the first appeal (516 F.2d 1),* coupled

*Appendix "B" to the petition is not, as represented at p. 2, a copy of the Ninth Circuit's reported opinion, in that it does not reflect that court's substantial modifications to the opinion on petition for rehearing.

with petitioners' acquiescence in that approach until the filing of their petition, underscores both the particular necessity for a showing of "exceptional circumstances" in this case and the stark absence of any attempt at such a showing in the petition.

2. The Decisions of This Court and the Courts of Appeals Uniformly Apply the Rule of Reason to the Type of Conduct Alleged by Petitioners.

The 1975 decision of the Ninth Circuit in the first appeal in these proceedings clearly stated as the issue for trial whether "the defendants intended to, or did, unreasonably restrain trade in violation of § 1 of the Sherman Act." 516 F.2d at 6-7. Petitioners' belated effort to fashion a new *per se* rule runs directly counter to the careful process by which this Court has considered additions to the list of *per se* offenses in the past. The market effect and economic consequences of challenged conduct have long been held to be the key to creation of new *per se* categories, *e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-59 (1977); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 178 (1965); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act, *e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9-10 (1979); *United States v. Topco Associates*, 405 U.S. 596, 607-08 (1972).

Here, not only was the market effect of the specific conduct challenged by petitioners stipulated by them to be just slightly over 1% (618 F.2d at 1345); in addition, the courts have indeed had "considerable experience" with the general type of business relationship challenged by petitioners (dealings between noncompeting affiliated corpora-

tions) and have consistently found them to be *reasonable.* Far from showing any conflict between the decision below and those of this Court or the other circuits, the uniform result of considerable judicial exposure to such intracorporate dealings has been to deny them any antitrust significance even under rule of reason analysis. *See, e.g., United States v. Columbia Steel Co.,* 334 U.S. 495, 523, 525 (1948); *United States v. Yellow Cab Co.,* 332 U.S. 218, 227 (1947); *Gough v. Rossmoor Corp.,* 585 F.2d 381, 385-89 (9th Cir. 1978), *cert. denied,* 440 U.S. 936 (1979); *Martin B. Glauser Dodge Co. v. Chrysler Corp.,* 570 F.2d 72, 83-84 (3d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978); *Knutson v. Daily Review, Inc.,* 548 F.2d 795, 801-04 (9th Cir. 1976), *cert. denied,* 433 U.S. 910 (1977); *Mutual Fund Investors v. Putnam Management Co.,* 553 F.2d 620, 626 (9th Cir. 1977); *Ark Dental Supply Co. v. Cavitron Corp.,* 461 F.2d 1093, 1094 (3rd Cir. 1972); *Beckman v. Walter Kidde & Co.,* 316 F.Supp. 1321, 1326 (E.D.N.Y. 1970), *aff'd per curiam,* 451 F.2d 593 (2d Cir. 1971), *cert. denied,* 408 U.S. 922 (1972); *Jos. E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 81-82 (9th Cir.), *cert. denied,* 396 U.S. 1062 (1969); *Syracuse Broadcasting Corp. v. Newhouse,* 319 F.2d 683, 687 (2d Cir. 1963).

Petitioners' reference to reciprocity and tying cases does not aid their attempt to fashion a new *per se* category. Both reciprocity and tying involve use of market power in one market to influence competition in a second market. This case in contrast involves a single market in which respondents lacked market power and in which petitioners stipulated to a *de minimis* effect on competition.

No reason for sudden departure from a uniform history of rule of reason analysis is shown by the petition or record in this case.

3. Reversal of a Jury Verdict for Failure of Proof Does Not Deny the Right to a Jury Trial.

Petitioners apparently urge that they were denied the right to a jury trial because the Court of Appeals reversed the jury verdict in their favor. The sole argument in support of this reason for granting the writ is a recitation of 37 cases over the past decade in which jury verdicts for antitrust plaintiffs have been vacated or reversed. Far from demonstrating any merit in petitioners' position, the 37 cases serve only to illustrate that, consistent with the Seventh Amendment, courts across the country perform their duty to review jury verdicts and overturn them when the evidence is insufficient or lower courts have improperly applied the governing principles of law to the facts. *See Galloway v. United States,* 319 U.S. 372, 389 (1943); *New York Times Co. v. Sullivan,* 376 U.S. 254, 285 n.26 (1964). The Ninth Circuit's proper discharge of that duty here neither offends the Seventh Amendment nor presents any reason for granting the writ.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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